ORIGINAL

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge

Circuit Court Case No. 2012-CP-23-07156

CHRISTINE WATTS

Respondent,

v.

SONIC AUTOMOTIVE 2752 LAURENS ROAD, GREENVILLE, INC. d/b/a CENTURY BMW

Appellant.

RECORD ON APPEAL

VOLUME II

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ATTORNEYS FOR DEFENDANT SONIC AUTOMOTIVE 2752 LAURENS RD., GREENVILLE, INC. D/B/A CENTURY BMW

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A. Yes, sir.
Q. Well, that explains a lot to me. What is a deal jacket?
A. That's where all these documents would be placed.
Q. Does that just mean a folder?
A. Yes, sir. It's a pre- --
Q. It's -- huh?
A. It's a pre-printed folder with this checklist and some other checklists.
Q. On the -- on the back of it.
A. Yes, sir.
Q. So when you put all this in the folder, they want to make sure they have all this in it.
A. Yes, sir.
Q. And then this folder is kept in your dealership.
A. Yes, sir.
Q. Is this checklist sent anywhere or it just sits there in -- on the folder?
A. In the folder.
Q. In the folder?
A. Yes, sir.
Q. It's not sent anywhere?
A. No, sir

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Q. Well, who reviews to see if the checklist is in there and properly done?
A. Corey would. Corey James.
Q. Corey James would look at it?
A. Yes, sir.
Q. Well, he's the one that did it.
A. Yes, sir.
Q. So he'd look at the checklist that he did to see that everything in the checklist was done.
A. Yes, sir.
Q. Does anybody else look at it?
A. Accounting probably.
Q. Probably accounting. So this -- this -- what do you call it, the deal folder would be sent to accounting?
A Yes, sir.
Q. And they check it over, too, to see that all these things are in here.
A. Yes, sir.
Q. Now, what -- what are they instructed to do if the -- with Mr. Martin when he didn't sign the arbitration agreement? What do they do then?
A. Nothing.
Q. Nothing?
A. Nothing.

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Q. They just look?
A. Yes, sir.
Q So this checklist, they just say, huh-uh, not signed.
A. It wouldn't state not signed.
Q. Well, it's blank.
A. Blank.
Q. And then they -- they wouldn't do anything.
A. No, sir.
Q. You don't know anything about how the arbitration agreement was presented to the Watts, other than you -- you say that Mr. James said it was each piece of paper was given to them, and he pointed to where to sign; that's all you know about the presentation of the arbitration agreement.
A. That is correct.
Q. You don't know anything that was said, anything else but that.
A. No, sir.
Q. And you're the man most knowledgeable. Do you have a record of how many arbitrations that you have -- you have gone through with reference to the arbitration agreement?
A. I'm sorry. I didn't understand.
Q. You have an arbitration agreement there.

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A. Yes, sir.
Q. It requires arbitration, you say.
A. Yes, sir.
Q. Has anybody ever arbitrated with you?
A. I have one now.
Q. One. Is that the only one you can remember?
A That's the only one that I've ever heard of.
Q. Well, how long have you been with this company?
A. 32 years.
Q. That's pretty good. So in 32 years, you haven't ever heard of another one except the one you have now.
A. Right.
Q. What's the one you have now?
A. I can't remember the guy's name. It's Turner.
Q. What's he mad about?
A. A paint defect on his car.
Q. What kind of car was it?
A. It's a BMW.
Q. BMW. Did Mr James leave on his own, or was he fired, or do you know?

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MR. BLACK: Object. Leave from where?
MR. LEWIS: He left from --
MR. BLACK: From Century BMW?
MR. LEWIS: He was up in -- he just told me.
MR. BLACK: In Charlotte? Okay.
BY MR. LEWIS:
Q. Charlotte.
A. Mr. James left on a mutual agreement. Corey's family was living in Charlotte. He was having to live in Greenville, and he needed to go back to Charlotte to his family.
MR. BLACK: That's why -- he's asking -- he's answering why he left Century BMW.
MR. LEWIS. I understand that. I'm not too bad. I can listen.
BY MR. LEWIS:
Q. All right. Do you know why he left Sonic in Charlotte?
A. No, sir.
Q. You don't know if he was fired or he left on his own?
A. No, sir.
Q. All you know is he wanted to leave your company to go back to Charlotte because that's where

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his family was.
A. Yes, sir.
Q. Well, did he come from Charlotte?
A. Yes, sir.
Q. Did he come from Sonic of Charlotte?
MR. BLACK: Object to the form.
A. I really don't remember where Corey -- what his other job was before us. I really don't remember.
BY MR. LEWIS:
Q. This claim you have in arbitration, what -- where is it in the process?
A. It's just in beginning stages.
Q. Someone just said they want -- they want to make a claim?
A. Yes, sir.
Q. Did they sue you first, or did they just go into arbitration?
A. They sued us, and then it went into arbitration.
Q. Who was the -- who is the lawyers involved; do you know?
A. Brad Martin.
Q. Brad Martin again, huh? He's the lawyer for you, or he's suing you?

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A. No, he's the lawyer for us.
Q. And who is the other guy?
A. I really don't remember his name, sir.
Q. And it's up here in Greenville?
A. Yes, sir.
Q. And it's over a BMW.
A. Yes, sir.
Q. Have you told anybody else about this claim, this arbitration claim, other than me here today?
A. I'm sure quite a few of my employees know about it.
Q. Well, how about people out -- all your -- any customers or anything?
A. No, sir.
Q. You don't tell that?
A. No, sir.
Q. You're frowning. Why are you frowning?
A. That wouldn't be a good business practice.
Q. Wouldn't be a good business -- okay. And you don't know how you choose an arbitrator under your arbitration agreement.
A. No, sir.
Q. You don't know anything about that.
A. I understand there's a board or a -- a

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panel that you call, and they assign them or whatever. But that's to the -- my extent of the understanding.
MR. BLACK: Cam, are you getting to a point where we can take a break soon?
MR. LEWIS: Sure, we can take a break now.
MR. BLACK: Okay.
(A recess transpired.)
BY MR. LEWIS:
Q. You've been with this company, I think you said 32 years.
A. Yes, sir.
Q. And that company is what -- which company?
A. Century BMW.
Q. All right. How -- did Sonic always own Century BMW?
A. No, sir
Q. When did they buy them out?
A. 1998.
Q. Okay. Now, how long have arbitration agreements been -- been used?
A. I became general manager in 2002, and they were in effect then.
Q. How about before that?
A. I can't answer to that, sir.

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Q. What were you before?
A. I was parts and service director.
Q. So as parts and service director, you didn't ever know what was in the packet?
A. No, sir.
Q. And in the -- you being appointed as the man most knowledgeable about the arbitration agreement, you never looked back in the history to see when it became any arbitration?
A. No, sir.
Q. Now, when did Mr. James leave you, that is, Century BMW?
A. To the best of my recollection, it was early 2006.
Q. Now, you said he left on mutual terms or something like that.
A. Mutual agreement.
Q. What does that mean?
A. I decided and he decided that this wasn't the place for him to be at this time.
Q. Okay Would it be fair to say you weren't happy with his work?
A. I was happy with his work.
Q. Well, then why -- why wasn't it good for him to be here?

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A. He was continuously late, but his work was very good.
Q. Okay. Now we got it. So he was late, but a good worker after he was late.
A. Yes, sir.
Q. Now, late, that means he just didn't come in five minutes, that would be real late.
A No, sir. Five minutes, in my book, is late.
Q. Well, you're one of these people.
A. Yes, sir.
Q. You want them on time.
A. Yes, sir
Q. So how -- how late would he be?
A. Five to ten minutes.
Q. And he would be five to ten minutes late over -- and how often?
A. At the end of his employment, it became more regular. Maybe twice a week, three times a week.
Q. And that just irritated you.
A. Yes, sir.
Q. And he was the -- is it finance and income or is it finance and insurance, F and I?
A. I've always called it finance and income.

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Q. You have?
A. Yes, sir.
Q. And you don't know whether it's finance and income or finance and insurance?
A. I've always called it finance and income.
Q. Okay. Fine. And so with him coming in five, ten minutes late two times, three times a week, you decided maybe it would be better if he would go somewhere else?
A. He needed to go home.
Q. He needed to go home. And you made that decision he needed to go home?
A. And he agreed.
Q. Okay. And did you get him a job then up there at Sonic?
A. No, sir.
Q. Where did he go when he went to Charlotte?
A. He went to Sonic when he went to Charlotte, but I did not get him the job.
Q You didn't get him the job?
A. No, sir.
Q. Well, how did he get a job back at Sonic when he left Sonic?
MR. BLACK: Object to the form.
A. I could only guess to that.

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BY MR. LEWIS:
Q. Well, guess at it.
MR. BLACK: Object to having the witness guess.
A. Networking.
BY MR. LEWIS:
Q. Networking.
A. Yes, sir.
Q. What was his job in Charlotte?
A. Previously?
Q. No, when he left you.
A. F and I. He took the same job in Charlotte that he left me.
Q. And went to another dealership?
A. Yes, sir.
Q. What was the dealership?
A. Arnold Palmer Cadillac.
Q. Arnold Palmer Cadillac. And that's a Sonic dealership?
A. Yes, sir.
Q And he was doing the same thing?
A. Yes, sir.
Q. Was he the only one in that dealership like he was in this dealership?
A. I don't know if he was the only one in that

store or not.
Q. Okay. Do you have a new guy?
A. Yes, sir.
Q. What's his name?
A. Rodney McCauly.
Q. And where is he from?
A. He is from the Greenville area.
Q. So he just -- did he come out of a Sonic store, or did he --
A. No, sir.
Q. You just went and found him?
A. I just went and found him.
Q. Did you know him?
A. No, I didn't personally.
Q. Who did?
A. His former employer recommended him.
Q. Who was that?
A. James Brockman.
Q. And what -- what's he?
A. He's a car dealer.
Q. And what dealer is that?
A. Kia.
Q. The -- we talked about that class-action waiver in that agreement, Exhibit Number 2. Do you remember that?

A. Yes, sir.
Q. Do you know when it was put in or --
A. No, sir.
Q. You just know that it's in there now?
A. I know that it's in there now.
Q. And you couldn't tell me if it was in there -- and we know it was in there when -- 6/25/05.
A. Yes, sir
Q. And it's been in there ever since.
A. Yes, sir.
Q. But we don't know how long before 6/25/05 it was put in.
A. No, sir.
Q. As a general manager, you don't -- do they -- how many of those stacks of these -- each of these pieces of paper in the packet, Exhibit Number 3, how many do they send you at a time, or do you run them off a Xerox?
MR. BLACK: Object to the form.
A. We order them. The exact quantity, I have no idea, in each package.
BY MR. LEWIS:
Q. So you order them.
A. Yes, sir.

Q. And how do you order them? Do you order them by some -- is there like -- you know, sometimes they say this is Form Number 666. Is there -- at the bottom, do you see -- looking at Exhibit Number 3, do you see that?
A. Yes, sir.
Q. Do you see the long one, the first long one that comes out? It's called the Full Disclosure Customer Worksheet. Do you see that? It's the first one.
A. Yes, sir.
Q. And down at the bottom, it has a Form 814WS.
A. Yes, sir.
Q. You know what, if anything, that means?
A. That's the Austin Business Forms form number for this.
Q. Who is Austin Business Forms?
A. That's the supplier of this form.
Q. And so who makes -- they just -- they print them up?
A. Yes, sir.
Q. Where is this Austin Business Form place?
A. I have no idea.
Q. How do you know about it?

A. It's one of our recommended vendors.
Q. So how do they know -- is this a worksheet that -- that Sonic tells you to use?
A. Yes, sir.
Q. And Sonic says that they got this form we want you to use.
A. Yes, sir.
Q. And you buy it from them.
A. Yes, sir.
Q. I notice on the Arbitration Agreement, I don't see any form numbers.
MR. BLACK: Is there a question?
BY MR. LEWIS:
Q. Do you see that?
A. Yes, sir.
Q. Well, how do you order it?
A. It's probably -- well, I can't attest to that, what I -- how you order it. I don't order the supplies.
Q. Well, it doesn't have a form number. How do you know what to ask for?
A. Probably by title.
Q. Now by title. So you order by title.
A. If it doesn't have a form -- a form number, you would order it by title.

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Q. And where do you order the Arbitration Agreements from?
A. All of our ordering is done online through Sonic.
Q. Through Sonic?
A. Yes, sir.
Q. Is there something you bring up? What kind of screen do you bring up; what's it called?
MR. BLACK: Object to the form.
BY MR. LEWIS:
Q. Form order?
A. The exact system name is PECOS. P-E-C-O-S.
Q. And when you bring up PECOS, what does it tell you?
A. It gives you the list of forms.
Q Oh, and you just can order like that.
A. Yes, sir.
Q. And the -- the form list, you see -- let's go back to that last page again on Exhibit Number 3. Are the All Cars Checklist, are those all forms?
A. You're talking about each individual --
Q. Yeah.
A. -- area? Some of theme are forms. Some of them are information.
Q. Okay. Well, let's look at the packet then.

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Look at the packet. Start with the first number, and that's 3995. Do you see that?
A. Yes, sir.
Q. Is that a form?
A. Yes, sir.
Q. And do you order that?
A. Yes, sir.
Q. Is that a required form by law, or just a required form by Sonic?
MR. BLACK: Object to the form. You can answer if you know.
A. This is a privacy notice. It is required by Sonic and probably required by law.
BY MR. LEWIS:
Q. All right.
A. It is required by law.
Q. And the next one is -- is this a form that you order?
A. No, sir. This is automatically printed out at the time the purchase is made, depending on what coverage the customer decides to or not to take
Q. And that's 3996.
A. Yes, sir.
Q. All right Let's look at 3997. Is that a form?

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A. Yes, sir.
Q. Is that a form that's required by law?
A. Yes, sir.
Q. And you order those from that same place?
A. Yes, sir.
Q. Okay. Look at 3998. That's not a form, is it?
A. I have no idea what that is. A fax confirmation.
Q. Okay. Look at 3999. That's -- is that a form?
A. Yes, sir.
Q. Is that one you order from the same place?
A. This one may not be. This one may be from the State of South Carolina.
Q. Okay. Is it a required form?
A. Yes, sir.
Q. By law?
A. Yes, sir.
Q. The next one is a vehicle history report, 4000.
A. This is computer-generated from BMW.
Q. Okay. How about 4001, is that part of the same report, or no?
A. This is -- this is where we shipped a lien

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off to someone.
Q. Okay. But that's not --
A. That's not a form, no.
Q. Okay. How about 4002?
A. This is a form.
Q. Is this a -- required by law?
A. This is an agreement to provide insurance
Q. An agreement with who?
A. The customer and their insurance company.
Q. Okay. Do you -- is that something that you require?
A. We do require it.
Q. But is it -- so this is a form of Sonic, not a -- a form by law.
MR. BLACK: Object to the form.
A. This is a form by Sonic.
BY MR. LEWIS:
Q. Okay. And you order it?
A. Yes, sir.
Q. All right. How about 4003?
A. This is a computer-generated.
Q. At your dealership?
A. Yes, sir. This is built into our computer system, so this is the way it prints.
Q. All Sonic dealerships have the same

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computer system?
A. Yes, sir, now we do.
Q. What is it called?
A. ADP.
Q. ADP. And 4004 would be another ADP-generated?
A. Yeah, the next three forms are the same form.
Q. Okay. How about -- how about now we're looking at 4007. We already talked about it.
A. Yes, sir.
Q. Now, is this form, when it comes, this full disclosure customer worksheet, is it long like this, or is it the same size of those other papers?
A. This form was long in 2005, and they changed it between 2005 and 2008. It's shorter now.
Q. It fits in to be like the other ones.
A. Yes, sir.
Q. But it was long back then.
A. Yes, sir.
Q. Now, the next one is 4008, which is Exhibit Number, I believe, 2, as well as part of the packet.
A. Yes, sir.
Q. And it's long.
A. Yes, sir.

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Q. Was it long at that time, or was it --
A. Yes, sir.
Q. -- short?
A. Yes, sir.
Q. It was long.
A. Long.
MR. BLACK: And by long, you mean on legal-size paper?
BY MR. LEWIS:
Q. Is this -- looking at it, is this the size of the document, the original document?
A. Yes, sir.
Q. Do you know how many words are in this document?
A. No, sir.
Q. Would you believe me there was 1100?
A. Yes, sir.
Q. And the next one, 4009, is a --
A. Ordered form.
Q. A what?
A. Ordered form.
Q. Ordered. And it's -- but it's not required by law?
A. Car invoice may be required by law; I'm not sure of that.

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Q. Okay. Car invoice. Now, this one here, looking at 4009, this is a car invoice to who? Who is it an invoice to?
A. This one's an invoice to the Watts.
Q. And what does it tell you, that this is what they paid, 32,000?
A. Yes, sir. Yes, sir.
Q. And the 32,000 is made up of 31,375, plus 299.50, plus 300, plus 25?
A. If that adds up to 32,000, yes, sir.
Q. Well, okay. What is total time price?
A. Oh, that would be if you financed it.
Q. If I financed it, it would be less?
A. It would be more, because of two lines above you would add your finance charge in.
Q. I'm con- -- I'm very confused. It has in here, number -- total time price. What is that? 31,700.50.
A. I don't -- what's that, 31 --
MR. BLACK: Let me just object that I think we've strayed beyond the topic in the Notice.
MR. LEWIS: Okay.
MR. BLACK: I'm giving you some leeway. The witness wasn't -- didn't come in prepared to analyze each of these forms in detail.

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BY MR. LEWIS:
Q. Okay. So you don't know what that is today.
A. Without a calculator and sitting down and figuring it out, probably not
Q. Okay.
A. But I just don't know right this moment.
Q. Okay. 4010, is that -- what is that?
A. It's an ordered form.
Q. And ordered, we mean ordered from Sonic?
A. Yes, sir.
Q. And is it required by law?
A. No, sir.
Q. The same as 4011?
A. Yes, sir.
Q. And 4012 is something that was generated on your computer?
A. Yes, sir.
Q. And 4013, I don't know what that is. That must be something that's stamped on the back of something. It doesn't matter.
A. I have no clue.
Q. And then you have pictures with people on them and an insurance card.
A. Yes, sir.

Q. And then you have another picture of a pretty lady. Do you see that of one?
A. Yes, sir.
Q. All right. That's 4015.
A. I saw that
Q. 4016, that must come off of a computer?
A. Yes, sir.
Q. 4017, what is that?
A. This is computer-generated, to do the tag work for the car.
Q. Okay. And 4018 is a --
A. A copy of a check.
Q. Okay. 4019, that's -- is that a form?
A. Yes, sir, that's an ordered form.
Q. Okay. And it's not required by law?
MR. BLACK: Object to the form.
A. The Retail Buyer's Order is required by law
BY MR. LEWIS:
Q. Okay. Required by law. Now, if I -- and is this form ordered?
A. Yes, sir. Yes, sir.
Q. And everything that's not written on it would -- that is -- that is, it looks typed, that would be on the ordered form?

A. Yes, sir.
Q. So every ordered form on BM -- from Sonic will have the processing fee there?
MR. BLACK: Objection. And I'll instruct you not to answer. That goes well beyond the Deposition Notice to the merits of the case.
MR. LEWIS: You shouldn't have given me the form.
BY MR. LEWIS:
Q. The next one, 4020?
A. This is sent to us by BMW.
Q. Is it required by law?
MR. BLACK: Object to the form. Go ahead.
A. I have no idea.
BY MR. LEWIS.
Q. How about 4021?
A. Continuation.
Q. All right. And then the certificate of title, we know what that is, 4022. 4023 is a what?
A. The back of the title.
Q. Okay. 4024, what is that?
A. That is a Form 400. This comes from the State of South Carolina.
Q. Is that required --
A. Yes, sir.

Q. -- by law?
A. Yes, sir. It's required.
Q. And is 4025 required by the law?
A. Yes, sir. That's the back of Form 400.
Q. Okay. 4026 is an internal form?
A. Yes, sir.
Q. And is this check requested, is that something that comes from Sonic, or is that just y'all's form?
A. This form comes -- all our forms that are pre-printed come from Sonic.
Q. So this one comes from Sonic, too.
A. Right, yes
Q. But it's not required by law?
A. No, sir.
Q Same with 4027?
A. Yes, sir.
Q. 4028?
A. This is a BMW computer printout.
Q. Okay. 4029?
A. Same.
Q. 4030?
A. Yes, sir. Same thing.
Q. 4031?
A. Same thing.

Q. Now, that's required by law, isn't it?
A. The odometer statement?
Q. Yeah.
A. This one is sent to BMW.
Q. But there is an odometer statement --
A. Yes, sir.
Q. -- required by law?
A. Yes, sir, there is.
Q. But this is not it?
A. No, sir.
Q. Okay. 4032.
A. That's a pre-printed form from Sonic.
Q. Is that required by law?
A. No, sir.
Q. And 4033?
A. Computer-generated, in-house form
Q. 4034?
A. Computer-generated, in-house.
Q. 4035?
A. The same.
Q. 40 -- I don't see it. It's cut off. It's CBM-0000042.
A. Right. This is a computer-generated, a copy of the one we just went over that was handwritten.

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Q. Oh, that is a copy of that one he wouldn't let me ask you about.
A. Yes, sir.
Q. And this is -- the next one is 4037. Those are government forms?
A. These are county tax papers.
Q. And 4038?
A. That's a copy of a fax.
Q. And 4039 is that checklist we've already gone over.
A. Yes, sir.
Q. And this is essentially what a packet would look like for anybody that bought a car.
A. Yes, sir.
MR. BLACK: Object to the form of the question.
BY MR. LEWIS:
Q. Now, if you had a -- if you were going to finance the car through you, would there be a finance packet, too, or would this packet, Exhibit Number 3, be bigger?
A. Exhibit 3 would be bigger.
Q. Was it -- and if you were going to lease a car, there would be just different documents that would support a lease, but it would be essentially

the same documents otherwise?
A. Yes, sir.
Q. Do you know -- we went through each of the documents in Exhibit Number 3. Do you know what the purchasers in this case were told about each of those documents?
A. No, sir.
Q. Do you -- what is the requirement you have on your F and I guy to explain each of the documents; does he have a requirement?
A. Yes, sir.
Q. And he's supposed to explain each one of them?
A. Yes, sir.
Q. And how long -- how long does that take?
A. Oh, it could take, depending if the customer had any questions on each one, it could take five, ten minutes a form --
Q. Is that what --
A. -- if they had questions.
Q. Well, what does it take normally? You've been in the business. Y'all sell 1200 cars a year. How long does it take to explain this packet? One guy, 1200 people.
MR. BLACK: Object to the form. The packet

contains a lot of documents that don't go to the customer.
MR. LEWIS: Okay.
BY MR. LEWIS:
Q. Pick up Exhibit Number 3. And I want you to look through it and tell me each document that the customer is explained.
A. The privacy notice, the first one.
Q. All right.
A. The second one, which is the --
Q. Give me the numbers of them at the bottom.
A. Okay. Okay. The first one is 3995.
Q Uh-huh.
A. 3996.
Q. Uh-huh.
A. 3997 is explained on the sales floor. This is a --
Q. Sales floor?
A. Yes, this is a document that's actually posted in the window of the car.
Q. So that document is for the salesman to explain.
A. It's -- yes, sir.
Q. But the F and I guy doesn't say anything about it?

A. He will go over it again.
Q. He will go over it again.
A. I'm going to skip 3998, because -- 3999 would be reviewed in the F and I office.
Q. Reviewed. Do they explain it to them or do they just review it? Do they have a requirement to explain it?
A. Well, yes, they would explain it. There's nothing but the sale-of-a-motor-vehicle form.
Q. Okay.
A. 4002 would be explained and ask the customer for information specifically on this form.
Q. Okay.
A. Skipping ahead, 4008.
Q. Yeah. We've already talked about that one
A. 4010.
Q. Uh-huh.
A. The printed version of 4019, the one we couldn't find the number on.
Q. 4019?
MR. BLACK: I think the printed version was --
MR. LEWIS: Okay.
MR. BLACK: The printed version is CBM --
BY MR. LEWIS:

Q. 4019 is gone through.
A. Yes, sir.
MR. BLACK: Well, he said the printed version.
A. The printed version.
BY MR. LEWIS:
Q. Yeah. Yeah. I don't understand the printed version. 4019 is printed.
A. The computer printed one, the one we could not find the -- the number on at the end.
MR. BLACK: It's CBM-000042. It's the one that your number got knocked off the bottom of.
MR. LEWIS: 40 what --
MR. BLACK: Four 0's, and then 42.
MR. LEWIS: 42.
BY MR. LEWIS:
Q. Okay. It's got them all typed.
A. Yes, sir.
Q. What do they do -- both of them are signed. Why do they go through one and then type one?
A. The -- the handwritten one is generated out on the sales floor with the sales manager.
Q. Oh, the sales manager.
A. Yes, sir.
Q. And so there's a new person that's been

involved here. We had -- I thought it went direct from Mrs. Elizabeth to Mr. James. It doesn't? There's somebody in between?
A. The salesperson will confer with the sales manager to get his signature, approval to sell the car.
Q So the -- I got -- I got to understand something. So this Exhibit Number -- Exhibit Number -- hold on -- 3, 4019 --
A. Yes, sir.
Q. -- that's done on the floor.
A. Yes, sir.
Q. Now, is the sales manager's signature on that document?
A. Yes, sir.
Q. And so they sit down there, and this is negotiated, and then the sales manager signs it.
A. Right.
Q. Okay. And then where does it go?
A. Then the salesperson takes it to Corey James at that time.
Q. And Corey James then types up Exhibit Number -- the one that doesn't have that cut off.
A. That is correct.
Q. CBM-000042.

A. Yes, sir.
Q. And should be exactly the same, except one's typed and one isn't.
A. Yes, sir.
Q. Well, why do you do that?
MR. BLACK. Object to the form.
A. Why do you do the first one, the handwritten one?
BY MR. LEWIS:
Q. No, why do you take one and get it all filled in in handwriting, and then take the time to type it -- type it and get it on a different -- the same form typed?
A. To make sure there's no mistakes.
Q. To make sure there's no mistakes?
A. Yes, sir.
Q. There's more likely to be a mistake if you go from a handwritten one to a typed one
MR BLACK: Object to the form.
A. These two have to match.
BY MR. LEWIS:
Q. Oh, they have to match I gotcha. And who determines they match?
A. The account -- I mean, the F and I office, Corey James.

Q. Now, who is -- the bottom signature, who is that?
MR. BLACK: There are a number of signatures. Which are you asking him about?
BY MR. LEWIS:
Q. On 000042. Mine is cut off a little bit. What's the bottom signature; is that Corey James?
A. Are you talking about where it says, this agreement, the very last --
Q. Yeah.
A. That would -- it's cut off, but it looks like Corey.
Q. Okay And then it says, disclaimer of warranties, purchaser's signature. The purchaser's signature is not there, right? Am I right?
A. You're talking on new vehicle disclaimer warranties?
Q. Yeah.
A. They didn't buy a new vehicle.
Q. So you have to sign either one of those?
A. Yes, sir.
Q. Okay. And Corey James is the officer of the company that signed this.
A. Yes, sir.
Q. And he is also the -- is that his signature

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on the 4019? Whose signature is that?
A. I haven't seen this signature in a long time, but I would assume it's Jeff Novak.
Q. And what is he?
A. He was the used car manager
Q. So the used car manager agreed to it, and Corey James agreed to it on a different form.
A. Yes, sir.
Q. Once they -- the used car manager agreed to it, it's over with then, isn't it? Does Corey James have the right then to not do it?
MR. BLACK: Object to the form.
A. Corey does not have the right to stop the deal.
BY MR. LEWIS:
Q. So why -- so he approved it, but he doesn't have the right to not approve it?
A. He would not sign it if it did not match up.
Q. But all he would be able to do is match it up, because once it's signed, as shown on 4019, then you have to sell the car.
MR. BLACK: Object to the form.
A. Sold -- 4019, we agreed to sell the car for this amount.

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BY MR. LEWIS:
Q. Right. And that's it.
A. The manager.
Q. Right.
A. Corey would have the right, if there was something that did not add up correctly, to go back to Jeff and say, there's something wrong here, I'm not going to sign it until you get it straightened out.
Q. And Jeff would have to go straighten it out.
A. Yes, sir.
Q. And that could even mean having -- making them pay more money?
MR. BLACK: Object to the form.
A. Not above what they originally agreed to.
BY MR. LEWIS:
Q. Okay. Now, this arbitration agreement says -- has some provision in there about small claims court. Do you understand that, or do you know anything about that?
A. I don't know anything about the small claims court.
Q. You what?
A. I don't know anything about the small

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claims court part of it.
Q. Does -- do you know if that's something they explain to people, or do you know? You don't know?
A. I don't know.
Q. Okay. We've got the packet that we showed before you, Exhibit Number 3. Okay. Our client said there were more documents than this, than shown, some other documents than shown in this packet. Do you know what they could have been?
MR. BLACK: Objection. Mischaracterizes the testimony.
BY MR. LEWIS:
Q. Well, could there have been more documents given to the Watts than are in this packet?
MR. BLACK: Okay. Form, speculation.
A. I mean, other than owner's manuals?
BY MR. LEWIS:
Q. Yeah.
A. There could be owner's manuals.
Q. Anything else?
A. There should be other -- no more legal documents, no.
Q. You know anything about what's been called the Dealer Act, the act that allows people to bring

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suits against dealers for not doing -- for fraud and so forth?
A No, sir.
Q. Have you ever read anything on it?
A. No, sir.
Q. Now, I want to ask you one more little set of questions. And what I want to know is you mentioned to me that there may be a training or -- and the training might lead us to what is taught to F and I people. Where would we go to find that?
MR. BLACK: Object to the form.
A. To find the training schedule?
BY MR. LEWIS:
Q. To find out what -- how they train people. What is --
A. Richard O'Connor.
Q. And he would have the training?
A. Yes, sir.
Q. And he's up in the offices in --
A. Charlotte.
Q. -- Charlotte. And what -- and it's called Sonic, the Sonic offices?
A. It's Sonic Automotive.
Q. Okay. In Charlotte?
A. Yes, sir.

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MR. LEWIS: Excuse me just a minute
MR. BLACK: Break?
MR. LEWIS: I hope that we can leave you.
(A recess transpired.)
MR. LEWIS: Thank you, Mr. Bishop.
THE WITNESS: Thank you.
EXAMINATION
BY MR. BLACK:
Q. Mr. Bishop, my name is Dennis Black. I'm from the law firm called Williams and Connolly. You understand I represent Century BMW?
A. Yes, sir.
Q. Mr. Lewis asked you a bunch of questions about what he termed "the packet" this morning, and I think it's marked in front of you as Exhibit 3. Do you recall those questions?
A. Yes, sir.
Q. Are there a number of documents in what he called the packet that are not shown to the customer at the time of the deal?
A. There's quite a few in there that wouldn't be shown to the customer.
Q. So what's -- what you've got in front of you as Exhibit 3 is not a stack of documents all of which are given to the customer in the F and I

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office.
A. That's correct.
Q. Let's go through and give some examples of that. Would the -- and you skipped over -- when you were asked about documents that were explained to the customer, you skipped over a number of documents in the deal jacket, right?
A. Correct. Those would be documents the customer wouldn't see.
Q. Okay. Let's look at CBM -- well, let me use his numbers since he did. If you turn to Document Number 4000, the vehicle history report.
A. That wouldn't be to the customer.
Q. And 4001, where you were paying off the lien on the trade-in?
A. That wouldn't be to the customer.
Q. If you go to the 4003.
A. No.
Q. And by no, you mean that doesn't go to the customer?
A. Would not go to the customer.
Q. 4004?
A. It's a copy of 4003, and 4005 and 4006 is all copies of the same document. They would not go to the customer.

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Q. How about 4009?
A. 4009 would go to the customer.
Q. 4012?
A. Would not.
Q. 4013?
A. Would not.
Q. 4014 came from the customer?
A. Yes, sir.
Q. Same for 4015?
A. Yes, sir.
Q. How about 4016?
A. That would not go to the customer.
Q. 4017?
A. Would not.
Q. 4018?
A No, sir.
Q. 4020?
A. No, sir
Q. 21?
A. No, sir.
Q. How about 22, does that go to the customer, 4022?
A. Yes. They paid cash for it; they would get this title.
Q. Okay. 4026?

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A. No, sir.
Q. 4027?
A. Would not go.
Q. 4028?
A. Would not go.
Q. 4029?
A. No.
Q. 4030?
A. No.
Q. 4031?
A. No, sir.
Q. 4032?
A. No, sir.
Q. 4033?
A. No, sir.
Q. 4034?
A. No, sir.
Q. 4035?
A. No, sir.
Q. 4038 is a fax from the customer sometime after the transaction?
A. Yes, sir.
Q. So that wouldn't have been explained to the customer during the transaction.
A. No, sir.

Q. And the checklist at 4039, that doesn't go to the customer, does it?
A. No, sir.
Q. Did Century BMW have an official policy of whether you would sell a vehicle to a customer who refused to sign the arbitration agreement?
MR. LEWIS: Object to the form.
A. If a customer objected to signing the arbitration form, we would still sell them the car.
BY MR. BLACK:
Q. You -- you testified that you -- that the F and I managers were not trained to volunteer to the customer that you don't have to sign this arbitration agreement. Do you recall that?
A. Correct. The F and I manager was not obligated to explain that they did not have to sign the arbitration agreement.
Q. Were they trained to tell the customer, you are required to sign this arbitration agreement?
A. No, sir.
Q. If the customer asked, am I required to sign this arbitration agreement as a condition of buying the car, what was Century BMW's policy for --
MR LEWIS: I object to the form.
A. The customer --

BY MR. BLACK:
Q. Let me ask the question. What was Century BMW's policy about whether they would sell a car to someone who objected to signing the arbitration agreement?
A. We would still sell the car.
Q. You testified that you could only remember the name of one person who had refused to sign the arbitration agreement and, nevertheless, bought a car. Are you aware that there are other customers whose names you don't remember who similarly refused to sign the arbitration agreement and you, nevertheless, sold them the car?
A. Yes.
MR. LEWIS: Object to the form.
BY MR. BLACK:
Q. And are there other customers other than the one person whose name you remembered who refused to sign the arbitration agreement and --
MR. LEWIS: Object to the form.
BY MR. BLACK:
Q. Let me finish my question. Are there people other than the person whose name you mentioned that you are aware of who refused to sign the arbitration agreement and, nevertheless, were

sold a car by Century BMW?
MR. LEWIS: Object to the form.
BY MR. BLACK:
Q. You can answer.
A. Yes, sir.
Q. You mentioned earlier that you're only aware of one arbitration that's been filed since you've been general manager?
A. Yes, sir.
Q. How many lawsuits are you aware of that have been filed against Century BMW since you've been general manager?
A. Actually, there was two.
Q. And does that include this one?
A. Yes, sir.
Q. So this one and one other.
A. Yes, sir.
Q. And was the one other the one that went to arbitration?
A. The other one, I cannot recall. I did not go to court. I believe it was dismissed between the two lawyers.
Q. Okay. So there's the Turner case that went to arbitration. There's the one other one.
A. Right

Q. And then there's this lawsuit.
A. Yes.
Q. And that's the only litigation you're aware of?
A. That's the only litigation I've been involved in since 2002. And before that, I was not involved in any.
MR. BLACK: Nothing further.
EXAMINATION
BY MR. LEWIS:
Q. You mentioned you remember some other customers that you couldn't remember on the arbitration agreement?
A. I remember other cus- -- customers not signing. I do not remember their names.
Q. Do you remember whether it was one, two, three, four?
A. Exact number, I couldn't tell you, sir.
Q. You couldn't tell me anything about it. You just remembered somewhere --
A. Yes, sir.
Q. -- just in your head somewhere.
A. Yes, sir.
MR. LEWIS: Nothing further.
(The deposition was concluded at 11:58 p.m.)

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SIGNATURE OF DEPONENT

I, the undersigned, JOHN ROBERT BISHOP, hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any:

PAGE	LINE	CHANGE	REASON

JOHN ROBERT BISHOP DATE

CERTIFICATE OF REPORTER

I, Kathy P Taylor, Registered Professional Reporter and Notary Public for the State of South Carolina at large, do hereby certify that the foregoing transcript is a true, accurate and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

WITNESS MY HAND, I have hereunto affixed my official seal this 1st day of February, 2008, at Greenville County, South Carolina

KATHY P. TAYLOR
REGISTERED PROFESSIONAL REPORTER
MY COMMISSION EXPIRES
JUNE 13, 2017

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(No information was requested.)

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BMW and MINI

21470

Vehicle History Report

Vehicle Information

VIN:	4USBT33554 LS50759
Model Code:	0425 BT43
Model Desc:	Z4 R 2
Engineering Series:	E85
Motor Type:	M54
Color Code:	354 (Titanium Silver Metallic)
Trim Code:	KASW (Black Leatherette)
Production Date:	2004/03

Retail Dealer:	26849
Retail Date:	05/25/2004
Wholesale Dealer:	26849
Wholesale Date:	03/11/2004

NEW VEHICLE WARRANTY

Expiration Date:	05/25/2008
Expiration Miles:	50,000

Customer Name:	MR BRENT BUSHA
Customer Address	6 LOGUE CT
	GREENVILLE SC 29615-5725
	UNITED STATES

Comments:

FULL MAINTENANCE 0050000
Expiration Date: 05/25/2008
Expiration Miles: 50,000

CPO 72 MO/100K MLS:PENDING
Expiration Date: 05/25/2010
Expiration Miles: 100,000

CPO Dealer: 21470 - Century BMW
CPO Enroll Date: 05/31/2005

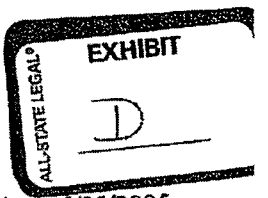
Phone: (864) 234-6437

Vehicle Options

Code	Description
0640	phone preparation
0682	in-dash CD player
08SP	CO2 control
0521	rain sensor and auto headlight
0494	heated front seats
0249	multi-function steering wheel
0540	cruise control
01CA	CO2 relevant vehicles
0692	CD changer preparation
0399	fully automatic soft top
0205	automatic transmission
0441	smoker's package
0676	hi-fi sound system
0645	radio frequency
0354	green stripe windscreen

Open Campaign Information

NO OPEN CAMPAIGNS



Century BMW

Menu of Investment Enhancements

WATTS

CLIENT: 0 DATE: 6/25/2005

☐ PLATINUM	☐ GOLD	☐ SILVER	☐ BRONZE

☐ **Vehicle Service Contract** CPO
72 Months or 100000 Miles
*Protects you from costly mechanical repairs
*Rental car coverage, *Towing
*Nationwide coverage

☐ **Tire and Wheel Guarantee** $499
*Flat tire replacement
*Insures your tires and wheels against road hazard damage
*24 Hour roadside assistance
*5 year Warranty

☐ **Ding Shield**
*Prepaid paint less dent repair ○ $494
*Flexible 3,4, or 5 yr. Terms ○ $519
*Repairs cover up to baseball size dents and dings ○ $544

☐ **TINT** $279
*Keeps vehicle cooler
*Protects interior and passenger from harmful UV rays
*3M product with a Lifetime Warranty

☐ **Upgraded Maintenance** ~~$1595~~
*Extends BMW Scheduled Maintenance from 4yrs, 50,000miles to 6yrs, 100,000
*Includes brakes and rotors 1395

☐ ***Resistall* Exterior and Interior Protection Plan** $559
*Protects your vehicle's paint against weather induced fading, loss of gloss, bird droppings, tree sap, acid rain, etc.
*Protects your interior against permanent staining from food, drink, and oil based stains
*5 year Warranty

☐ **Safe Lease** $750
*Wear and Tear Protection for leased vehicles
*Covers paint damage, light lenses, and upholstery up to $5,000
*See agreement for details

☐ **Etch Pro** $199
*Pays up to $2500 if vehicle is stolen and not recovered
*Pays up to $1000 for partial loss deductible reimbursement

☐ **Invisi-Shield** $576
*A deterrence against stone chips bugs, and road debris
*Lifetime warranty against yellowing, peeling, fading, and cracking
*3M Product, computer laser cut specifically for your vehicle

☐ **Easy Care Gap** (Cash Only) $499
*Pays due to theft or collision if a total loss
*Benefit is up to 150% of MSRP or NADA value
*Pays the difference between loan payoff and insurance settlement

Total Products Purchased $ -
☐ Loan ☐ Lease ☐ Cash
60 Payments of $ -
Additional Upfront $ -

All products are optional. I understand I am not required to purchase products to obtain financing. The dealer makes no additional warranties, whether expressed or implied. I understand that I must qualify to secure financing, and such sales are subject to approval from financial institution. I understand that all payments are estimates. This form does supercede or replace the Retail Loan or Lease Contract. Insurance premiums are regulated by state law. The products shaded are the ones I have chosen to purchase.

Client Signature

Client Signature

ALL-STATE LEGAL®
EXHIBIT
4

STATE OF SOUTH CAROLINA COUNTY OF AIKEN Heather Herron, Natalie Armstrong, Michael Ritz, Julie Freeman, Christine Watts, Alison Dannert, Michael Blease, Michael Watts, Individually and for the Benefit of All Car Buyers Whom Paid "Administrative Fees" as Described below to Defendants Plaintiffs, vs. Century BMW a/k/a Sonic Automotive, Dick Dyer & Associates, Inc : Galeana Chrysler Plymouth, Inc. a/k/a Galeana Chrysler Jeep, Inc.; J.L.H. Investments, LP a/k/a Hendricks Honda; Overland, Inc. d/b/a Land Rover of Columbia; Taylor Toyota a/k/a Taylor Investments; and Toyota of Greenville, Inc., et. al. Defendants.	IN THE COURT OF COMMON PLEAS CIVIL ACTION NO.: 06-CP-02-1230 RECEIVED FEB 2 0 2008 **PLAINTIFF CHRISTINE WATTS'S SECOND SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO DEFENDANT CENTURY BMW'S MOTION TO COMPEL ARBITRATION**

Plaintiff Christine Watts submits this Second Supplemental Memorandum in Opposition to Defendant Century BMW's Motion to Compel Arbitration.[1]

BACKGROUND

This motion was argued on November 30, 2007. At the hearing, the Court gave the parties the option to take depositions concerning the arbitration agreement. The parties took these depositions on January 29, 2008 and January 30, 2008. Copies of the depositions are attached as Exhibits A, B, and C.

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[1]This is the third memorandum submitted by Plaintiff addressing this motion. Plaintiff previously submitted Plaintiffs' Memorandum in Opposition to Motions to Dismiss on March 9, 2007; and Plaintiff Christine Watts's Supplemental Memorandum in Opposition to Century BMW's Motion to Compel Arbitration on November 28, 2007.

FACTS

Plaintiffs Christine Watts's and Michael Watts's recollections of the events surrounding the execution of the arbitration agreement are undisputed. Defendant Century BMW was unable to produce any witnesses with knowledge of the Watts transaction.[2]

On January 25, 2005, Plaintiff Christine Watts, a twenty-four year old girl, and her father, Michael Watts, a garage door salesman, purchased a car from Defendant Century BMW [3] The vehicle was a graduation present for Ms. Watts.[4] The car was purchased to be Ms. Watts's primary source of transportation and was needed so that she could get back and forth to work.[5]

After the parties agreed to a price for the car, Century BMW's F&I manager took Ms Watts and her father into a small cubicle to sign paperwork.[6] Century BMW refers to this process as "rolling out the paper."[7]

The Wattses say they were presented with a big packet of documents containing flags indicating where the Wattses were supposed to sign.[8] Century BMW's General Manager

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[2]Exhibit B, 30(b)(6) Deposition of Century BMW, p. 10, ll. 7-22; p. 13, ll. 12-16; and p. 17, ll. 15-19.

[3]Exhibit A, Deposition of Michael Watts, p. 17, l. 15 - p. 18, l. 8; Exhibit E, Drivers License; and Exhibit D, Affidavit of Christine Watts, ¶ 2.

[4]Exhibit A, Deposition of Michael Watts, p. 23, ll. 11-14.

[5]Exhibit C, Deposition of Christine Watts, p. 59, ll. 11-20.

[6]Exhibit A, Deposition of Michael Watts, p. 40, ll. 21-25; p. 49, ll. 9-21. Exhibit B, 30(b)(6) Deposition of Century BMW, p. 18, ll. 15-18; p. 18, ll. 23-25. Exhibit C, Deposition of Christine Watts, p. 39, ll. 3-14.

[7]Exhibit B, 30(b)(6) Deposition of Century BMW, p. 18, ll. 15-18 and p. 18, ll. 23-25.

[8]Exhibit A, Deposition of Michael Watts, p. 53, ll. 10-20; Exhibit C, Deposition of Christine Watts, p 51, l. 2 - p. 52, l. 17

testified that it was the F&I manager's custom to present individual documents and point to the place on the documents that needed to be signed and say "sign here."[9]

The Wattses signed at least eight different documents.[10] Multiple copies of some of the documents were signed by the Wattses.[11] Three of the eight documents were required to be signed by law.[12]

The arbitration agreement at issue in this motion was one of the documents included in the packet.[13] This arbitration agreement is a form contract drafted by Century BMW.[14]

The Wattses say there was no discussion with the F&I manager about the arbitration agreement.[15] Century BMW's General Manager did not know what was discussed with the Wattses but stated that he would expect his people to tell the customer that it's "a document providing a remedy for the customer without having to go to court."[16] The General Manager testified as follows:

Q: Can you sit here and tell me what this form contains?
A. I'm not an expert, but I can tell you that this is a document providing remedy for

---

[9]Exhibit B, 30(b)(6) Deposition of Century BMW, p. 22, l. 14 - p. 23, l. 1

[10]Exhibit F, copies of documents provided by Century BMW signed by the Wattses.

[11]Exhibit C, Deposition of Christine Watts, p. 46, ll. 9-11

[12]Exhibit B, 30(b)(6) Deposition of Century BMW, p. 59, ll. 1-16; p. 60, ll. 10-19; p. 66, ll. 13-18; p. 67, l. 21 - p. 68, l. 2. *See also* Exhibit A, Deposition of Michael Watts, p. 51, ll. 7-13.

[13]Exhibit B, 30(b)(6) Deposition of Century BMW, p. 15, ll. 7-17

[14]Exhibit B, 30(b)(6) Deposition of Century BMW, p. 37, ll. 7-14.

[15]Exhibit C, Deposition of Christine Watts, p. 47, ll. 12-15.

[16]Exhibit B, 30(b)(6) Deposition of Century BMW, p. 16, l. 8 to p. 17, 10.

the customer without having to go to court.

Q. If you were to explain it, that's what you would say?

A. Yes, sir.

Q. Is there anything else you'd tell them other than it's a remedy for the customer and you don't have to go to court?

...

A. No, sir, I would tell them nothing else.

Q. Okay. And is that what you expect your employees to tell the -- the people?

A. They're more informed than I.

Q Well, is that what you expect them to tell them, at least that?

A. At least that.

Q. Okay. Is there anything else you expect to tell -- them to tell them?

A. No, sir.[17]

Anyone would sign the arbitration agreement if given the misleading explanation touted by Century BMW's General Manager.

The Wattses were led to believe that they had to sign all of the documents in the packet in order to get the car. Michael Watts testified as follows:

Q. And I take it, from what you've said, you didn't object to signing the document at the time.

A. I didn't know I didn't have to.[18]

The Wattses signed the arbitration agreement because they thought they had to sign it to get the car. Christine Watts stated:

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[17]Id.

[18]Exhibit A, Deposition of Michael Watts, p. 54, ll. 10-12.

Q. Okay. Let's go to Number 14 [arbitration agreement]. Okay? Was CBM-14 passed to you?
A. I'm sure that it was in the packet.
Q. Okay. Is that your signature?
A. That is correct.
Q. Did you know what you were signing?
A No, I did not.
Q. Why did you sign it?
A. I thought I had to to buy the car.[19]

The fact that the arbitration agreement was presented on a take-it or leave-it basis is further supported by the fact that Century BMW's General Manager, with 32 years of experience, could only name one customer whom was allowed to purchase a car without signing the arbitration agreement.[20] The General Manager stated·

Q. And since 2005 or -- 5, since this agreement here, how many of those cars did anybody refuse to sign an arbitration agreement on?
A. I don't know that number, sir.
Q. Do you know of one?
A. Yes, sir.
Q. You do?
A. Yes, sir.
Q. Who was that?
A. Brad Martin.
Q. And who is Brad Martin?
A. Our attorney
Q. Oh. Okay. Now, give me one more.
A. I cannot give you another name.[21]

Century BMW sells over 1,200 cars a year and the General Manager can only name one person, an attorney in the car cases, as a customer whom was allowed to purchase a car without signing

---

[19]Exhibit C, Deposition of Christine Watts, p. 50, ll. 10-18.

[20]Exhibit B, 30(b)(6) Deposition of Century BMW, p.45, ll. 10-12 (32 years experience); p. 31, ll. 1-14.

[21]Exhibit B, 30(b)(6) Deposition of Century BMW, p. 31, ll. 1-14.

the arbitration agreement. This shows the arbitration agreement is presented as mandatory.

There was no doubt in Ms. Watts's mind that she had to sign all of the documents to get the car. Ms. Watts testified as follows:

> Q. Okay. Okay. Were you of the opinion you had to buy -- that you had to sign the documents where presented with the flags in order to get the car, or not?
>
> . .
>
> A. Yes.
>
> Q. Okay Any doubt in your mind about that?
>
> . .
>
> A. No.[22]
>
> Q. Why did you think you had to sign any or all of these documents in order to get the car?
>
> A. The way it was presented, I just thought I had to sign everything.[23]

ARGUMENT

A. This Court Should Follow the South Carolina Supreme Court in Simpson v. MSA of Myrtle Beach, 373 S.C. 14, 644 S.E.2d 663 (S.C.2007) and Hold the Arbitration Agreement to be Unenforceable

The South Carolina Supreme Court in Simpson v. MSA of Myrtle Beach, 373 S.C. 14, 644 S.E.2d 663 (S.C.2007), found a similar form contract in an automobile transaction to be unconscionable and unenforceable The facts in this case mirror those in Simpson. Included below is a chart comparing the significant facts in Simpson to the facts in this case.

Simpson Significant Facts	Facts in This Case
The Defendant used a form contract. 644 S.E.2d at 669.	The contract here is a form contract. Exhibit B, 30(b)(6) Deposition of Century BMW, p. 37, ll. 7-14.

[22]Exhibit C, Deposition of Christine Watts, p. 58, ll. 6-17.

[23]Exhibit C, Deposition of Christine Watts, p. 51, ll. 2-6.

Vehicle was a necessity because it was for plaintiff's primary source of transportation. Id. at 670.	The vehicle here is also a necessity because it was to be Christine Watts's primary source of transportation and was needed to get back and forth from work. Exhibit D, Affidavit of Christine Watts, ¶ 3; Exhibit C, Deposition of Christine Watts, p. 59, ll. 11-20.
The plaintiff did not understand the implications of arbitration. Id. at 670.	The Wattses had no understanding of arbitration. Exhibit A, Deposition of Michael Watts, p. 22, ll. 19-21; Exhibit C, Deposition of Christine Watts, p. 20, ll. 3-6; Exhibit D, Affidavit of Christine Watts, ¶ 7.
The plaintiff did not have a lawyer present when she signed the arbitration agreement. Id. at 670.	The Wattses did not have a lawyer present when they signed the arbitration agreement. Exhibit C, Deposition of Christine Watts, p. 51, ll. 7-9; Exhibit D, Affidavit of Christine Watts, ¶ 8.
The agreement was hastily presented for plaintiff's signature Id. at 670.	The agreement was hastily presented for the Wattses' signatures. Exhibit D, Affidavit of Christine Watts, ¶ 4.
The agreement purported to take away statutory rights under the Dealers Act. Id. at 671.	The Century BMW arbitration agreement attempts to take away statutory rights to bring a group action and obtain a group injunctive relief under the Dealers Act. *See* S.C. Code Ann. §56-15-110(2).
The agreement contained text in small font. Id. at 670	The text of the arbitration agreement here is in less than 8 point font. Exhibit D, Affidavit of Christine Watts, Exhibit B, arbitration agreement.
The agreement was drafted by a corporate entity who was a superior party. Id. at 670.	The agreement was drafted by Sonic Automotive, a multi million dollar corporation. Exhibit B, 30(b)(6) Deposition of Century BMW, p. 37, ll. 7-14. Michael Watts sells garage doors and at the time Ms. Watts signed the agreement she was a 24 year old student. Exhibit A, Deposition of Michael Watts, p. 17, l. 15 - p. 18, l. 4, Exhibit E, Drivers License. Clearly, Century BMW was the superior party.

The agreement purported to take away rights otherwise available by law. Id. at 670	The arbitration agreement here attempts to take away statutory rights to bring a group action and obtain a group injunctive relief which are provided in the Dealers Act and otherwise available by law.
The plaintiff believed the agreement was presented on a take-it or leave-it basis. Id. at 669.	The Wattses were led to believe the arbitration agreement was presented on a take-it or leave-it basis and that they had to sign it to get the car. Exhibit A, Deposition of Michael Watts, p. 54, ll. 10-12; Exhibit C, Deposition of Christine Watts, p. 46, ll. 18-22; p. 50, ll. 10-18; p. 51, ll. 2-6; and p 58, ll. -17, Exhibit D, Affidavit of Christine Watts, ¶ 5.

As shown in the above chart, the facts in this case are just like the facts in Simpson. Therefore, the Court should follow Simpson and find the Century BMW arbitration agreement to be unconscionable and unenforceable.

B. The Fact here are Similar to Those Emphasized by Courts Striking Down Similar Arbitration Agreements in Other Jurisdictions.

There is an emerging trend of cases striking down attempts by corporations to use arbitration agreements as devices to take away consumers' ability to bring actions on behalf of a group. Since this motion was argued, two more courts have found similar arbitration agreements purporting to take away the right to bring suit on behalf of a group to be unconscionable and unenforceable Tillman v. Commercial Credit Loans, Inc., 655 S.E.2d 362 (N.C 2008) and Woods v. QC Financial Services, Inc. dba Quik Cash, (Order and Judgement Missouri Circuit Court filed December 31, 2007). Copies of these opinions are attached as Exhibit G.

Included below is a chart showing that the facts found to be significant by the North Carolina Supreme Court in Tillman v. Commercial Credit Loans, Inc., 655 S.E.2d 362

(N.C.2008) are also present in this case.

Tillman Significant Facts	Facts in This Case
There were no negotiations or opportunity to negotiate the clause. 655 S.E.2d at 365.	There was no discussion of the arbitration agreement here. Exhibit C, Deposition of Christine Watts, p. 47, ll. 12-15. Instead, the F&I manager's practice was to simply point and say "sign here." Exhibit B, 30(b)(6) Deposition of Century BMW, p. 22, ll. L. 14 - p. 23, l. 1.
The defendant drafted the arbitration agreement. Id. at 365	The Defendant here also drafted the arbitration agreement. Exhibit B, 30(b)(6) Deposition of Century BMW, p. 37, ll. 7-14
The case involved complex litigation that would be expensive and time consuming. Id. at 368.	This case has been designated as complex by this Court and has been ongoing since August 2006.
AAA average price of arbitrators was $1,225 per day. 655 S.E.2d at 367.	The subject arbitration agreement is also under the AAA rules and requires the parties to pay arbitrators.
Loan officer told plaintiffs where to sign. Id. at 367.	In this case, the documents were in a packet with flags indicating where to sign and the F&I manager's practice was to point and say "sign here." Exhibit B. 30(b)(6) Deposition of Century BMW, p. 22, l. 14 - p. 23, l. 1; Exhibit C, Deposition of Christine Watts, p. 51, ll. 2-17; p. 58, ll. 6-7
In Court proceedings, you do not pay for the judge but in arbitration you have to pay for the arbitrator. Id. at 371.	The AAA rules referenced in the arbitration agreement here require the parties to pay for the arbitrators.
The plaintiffs were rushed through the signing of documents. Id. at 370.	The agreement here was "hastily" presented for Ms. Watts's signature Exhibit D, Affidavit of Christine Watts, ¶ 4.

A Missouri court in Woods v. QC Financial Services, Inc. dba Quik Cash, (Order and Judgement Missouri Circuit Court filed on December 31, 2007) also emphasized facts that are present in this case. Included below is a chart comparing these facts.

Woods Significant Facts	Facts in This Case
The plaintiff was pursuing a statutory right to bring a class action separate from procedural class action and thus the agreement was taking away statutory rights. Opinion, p 14.	The Plaintiff here is pursuing a statutory right to bring suit on behalf of a group under the Dealers Act. *See* S.C. Code Ann. §56-15-110(2).
Arbitration removed incentive to Defendant to comply with law because there would be no binding precedent. Opinion, p. 3.	In this case, an arbitration award will not be binding legal precedent.
The defendant admitted the agreement was a form contract. Opinion, p. 8	The Defendant here admits that the arbitration agreement is a form contract. Exhibit B; 30(b)(6) Deposition of Century BMW, p. 37, ll. 7-14.
There were over 1,300 words in the agreement shrunk to fit on one page in 8 point font. Opinion, p. 9.	The arbitration agreement here is one page with over 1,100 words in less than 8 point font. See Exhibit D, Affidavit of Christine Watts, Exhibit B, Arbitration Agreement.
The President of the defendant was not knowledgeable about how the arbitration clause worked. Opinion, p. 9.	The General Manager and the F&I manager here are not knowledgeable about how the clause works. Exhibit B, 30(b)(6) Deposition of Century BMW, p. 24, l. 18 - p. 25, l. 6.
The arbitration provided for confidentiality and prevented others from learning of wrongdoing Opinion, p 11-12	The arbitration agreement here references the AAA rules which provide for confidentiality. Exhibit D, Affidavit of Christine Watts, Exhibit B, Arbitration Agreement.
The defendant admitted it does not notify other customers when a claim is filed against the company and does not intend to do so in the future Opinion, p 11.	The General Manager, in this case, when asked if Defendant would notify customers of arbitration claims, frowned and stated that it would not be a good business practice to notify other customers of claims. Exhibit B, 30(b)(6) Deposition of Century BMW, p. 48, ll. 8-19.
The defendant could not articulate the differences between going to court and pursuing claims in arbitration and admitted he knew little about either. Opinion, pp. 15.	The General Manager here admitted he did not know much about arbitration or the rules governing arbitration. Exhibit B, 30(b)(6) Deposition of Century BMW, p. 24, l. 18 - p. 25, l. 6.

The defendant had thousands of customers and never negotiated the clause. Opinion, pp 8-9.	Century BMW sells 1200 cars annually, has used the arbitration agreement since at least 2002, and the General Manager can only recall the name of one purchaser who was allowed to buy a car without signing the arbitration agreement. Exhibit B, 30(b)(6) Deposition of Century BMW, p. 30, ll. 9-25; p. 49, ll. 20-23; p. 31, ll. 1-19.
The arbitration agreement, when typed in 12 point font and double spaced, was over 6 pages long. Opinion, p. 9	The arbitration agreement here, when typed in 12 point font and double spaced, is over 5 pages long. Exhibit H, retyped version of the agreement.

C. The Facts Here Are Even Worse than in the above Cases.

The Wattses were presented a packet of documents containing multiple documents which were required to be signed by law. Within that packet there were flags indicating where the Wattses were supposed to sign. The F&I Manager pointed and told the Wattses where to sign the documents. There was nothing telling the Wattses that the arbitration agreement, unlike the documents required to be signed by law, was not mandatory. Clearly, the Wattses were led to believe that they were required to sign the arbitration agreement just like they were required to sign the other documents required to be signed by law.

Furthermore, the Watts stated that there was no discussion of the arbitration agreement.[24] Century BMW's General Manager did not know what was discussed with the Wattses but stated that he would expect his people to tell the customer that it's "a document providing a remedy for the customer without having to go to court."[25] This statement is misleading because the arbitration agreement does not give a remedy but instead takes away remedies and statutory rights. The Century BMW explanation is further evidence showing that arbitration agreement should not be enforced.

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[24]Exhibit C, Deposition of Christine Watts, p. 47, ll. 12-15.

[25]Tab B, 30(b)(6) Deposition of Century BMW, p. 16, l. 8 to p. 17, 10.

D. The Court Should Not Enforce the Arbitration Agreement Because There Was No Meeting Of the Minds Between the Parties.

"South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to *all* essential and material terms of the agreement." Patricia Grand Hotel, LLC v. MacGuire Enterprises, Inc., 643 S E.2d 692, 694 (S.C.App.,2007) There was no meeting of the minds here because none of the signatories to the arbitration agreement understood what they were signing.

Neither of the Wattses had ever participated in an arbitration nor had any understanding of what arbitration was. Christine Watts testified as follows:

Q. At the time you were in Century BMW buying the Z-4, did you have an understanding what arbitration is?
A. No.[26]

Q. Okay. Up until today, have you ever participated in arbitration in any capacity, as a witness or a party or anything like that?
A. No.[27]

Michael Watts testified as follows.

Q. Do you have an understanding of what arbitration is?
A No, sir.[28]

Q. I think you just answered this, but have you ever participated in an arbitration, either as a witness or a party?
A. No, sir.[29]

Similarly, Century BMW's General Manager testified as to his and the F&I manager's lack of knowledge:

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[26]Tab C, Deposition of Christine Watts, p. 20, ll. 3-6

[27]Tab C, Deposition of Christine Watts, p. 20, ll. 15-18.

[28]Tab A, Deposition of Michael Watts, p 22, ll. 19-21

[29]Tab A, Deposition of Michael Watts, p 23, ll. 7-10.

Q. Okay Does Mr. Courtney James know anymore about how arbitration works than you, or would you say you're better?
MR. BLACK: It's Corey James.
MR. LEWIS: Corey James. Mr. James.
A I would say neither one of us would be involved in the process or actually been through the process.
Q. Or know anything about it?
A. Not much.
Q. Or what the rules are or what you have to do; do you know any of that?
A. No, sir.[30]

None of the parties whom signed the arbitration agreement understood what they were signing Accordingly, there was no meeting of the minds as to what was allegedly being agreed to and no contract was formed. Therefore, the arbitration agreement should not be enforced.

D. The Arbitration Agreement Is Unconscionable.

The arbitration agreement purports to take away statutory rights that are designed to protect consumers. As stated by the South Carolina Supreme Court in Simpson, there are strong public policy reasons behind the enactment of the Dealers Act and the Dealers Act's purpose is to "punish acts that adversely affect the public's interest." Simpson, 644 SE2d at 671. The Century BMW arbitration agreement's attempt to prohibit group actions and group injunctive relief would take away important remedies in S.C. Code Ann. §56-15-110(2) that are designed to protect the public. This is contrary to the purposes behind the Dealers Act and therefore unconscionable.

The arbitration agreement is so one-sided that even Century BMW's own lawyer, Brad Martin, refused to sign it when he purchased a vehicle.[31] Mr. Martin is the only customer that the General Manager could name in over 6,000 transactions that was ever allowed to purchase a car without signing the arbitration agreement.[32] If the agreement is so bad that Mr Martin will not

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[30]Tab B. 30(b)(6) Deposition of Century BMW, p. 24, l. 18 - p. 25, l 6.

[31]Tab B, 30(b)(6) Deposition of Century BMW, p. 31, ll. 1-19.

[32]Tab B, 30(b)(6) Deposition of Century BMW, p 30, ll. 9-25; p. 49, ll. 20-23; p. 31, ll. 1-19.

sign it, the Court should not enforce it against Ms. Watts.[33]

CONCLUSION

For the reasons stated at oral argument, in Plaintiffs Memorandum in Opposition to Motions to Dismiss, Plaintiff Christine Watt's Supplemental Memorandum in Opposition to Century BMW's Motion to Compel Arbitration, and the reasons stated above, Defendant Century BMW's Motion to Compel Arbitration should be denied.

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[33]The South Carolina Supreme Court has stated that it would not enforce the type of class action waiver at issue in this case. "[P]reclusion of class-wide or consolidated arbitration in an adhesion contract, even if explicit, undermines principles favoring expeditious and equitable case disposition absent demonstrated prejudice to the drafter of the adhesion contract." Bazzle v. Green Tree Financial Corporation, 351 S.C. 244, 569, S.E.2d 349 (2002) (*R'vd on other grounds*).

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By: _____

Attorneys for the Plaintiffs

February 18, 2008

Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Margarita Sosa, secretary for the law firm of Lewis & Babcock, L.L.P., hereby certify that I have served a copy of **Plaintiff Christine Watts's Second Supplemental Memorandum in Opposition to Defendant Century BMW's Motion to Compel Arbitration** upon opposing counsel and/or their registered agents, by mailing a copy of same, postage prepaid and return address clearly indicated on said envelope, to said parties at the following address:

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February 19, 2008

Margarita Sosa

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF AIKEN
HERRON, et al.,

Case No.
2006-CP-02-1230

Plaintiffs,

vs.

DICK DYER & ASSOCIATES, INC., et al,

Defendants.

DEPOSITION OF: MICHAEL WATTS

DATE: January 29, 2008

TIME: 9:08 a.m.

LOCATION: LEATHERWOOD WALKER TODD & MANN, P.C.
300 East McBee Avenue, Suite 500
Greenville, South Carolina

TAKEN BY: Counsel for Defendant,
CENTURY BMW

REPORTED BY: KATHY P. TAYLOR,
Registered Professional Reporter

Computer-Aided Transcription By:
A. WILLIAM ROBERTS, JR. & ASSOCIATES

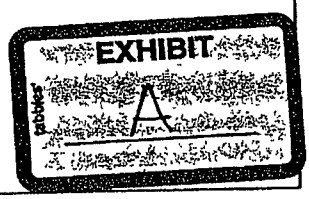
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ALSO PRESENT
MELANIE BLEASE, Paralegal

(Index at rear of transcript)

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STIPULATION

It is stipulated by and between Counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, Rule 30; that all objections as to Notice of this deposition are hereby waived, that all objections except as to form are reserved until the time of trial, and that the deponent does not waive reading and signing of this deposition

* * * * * * * * * * * *

MICHAEL WATTS,

being first duly sworn, testified as follows

EXAMINATION

BY MR BLACK.

Q Good morning Mr Watts Could you state your name and address for the record

A. Michael M Watts 210 Providence Square, Greenville, South Carolina 29615

Q And, Mr Watts, my name is Dennis Black. I'm from a law firm called Williams & Connolly And do you understand I represent Century BMW in this case?

A. Correct.

Q Okay The other counsel at the table, just so you know, also represent others, either Century

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BMW or other defendants in the case. And you have your counsel here?

A. Yes

Q Okay Have you ever had your deposition taken before?

A. One time.

Q And when was that?

A. About 20 years ago

Q And was that in a business dispute, a personal dispute?

A. It was a workers' comp dispute

Q Just to give you a little refresher course after 20 years, I'll be asking a series of questions today Hopefully you'll be answering them If you can try to answer the questions aloud and with words, because the court reporter can't take down nods and shakes and shrugs

A. Okay

Q. Is that acceptable?

A. It's – yes.

Q And try to avoid saying uh-huh or huh-uh in response to my questions, because they look very similar on the transcript, and it will be hard to decipher later Is that –

A. Yes, sir

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Q If you don't understand any of my questions, please ask me to clarify or explain any problem you have with the question. And if you have a problem or need clarification, please direct your request for clarification to me and not to your counsel

A Yes, sir

Q Is that okay?

A (Witness nods head)

Q And under the rules, just so you know, you're not allowed to talk to your counsel about this deposition or the case from now until when we conclude the deposition, even if we take a break. Is that acceptable?

A Yes, sir

Q And if -- this isn't an endurance contest, so if at any time you need to take a break for any reason, feel free to ask, and we'll take a break.

A Yes, sir

Q Okay What did you do to prepare for your deposition today?

A I met with counsel on Sunday night. I got the time and place where we were going to meet, and we briefly looked at the paperwork.

Q And what -- when you say the paperwork,

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what paperwork was that?

A The sale paperwork. The information for the bill of sale when we bought the car

Q How many documents would you say you looked at?

A 20 Approximately 20

Q And without getting into the substance of what was said did you have a chance to discuss those documents with your counsel?

A Briefly

Q Had you seen all the documents you were shown before?

A No sir

Q Did it include -- I sent over last week to your counsel a -- the dealership's file on the transaction. Were those the documents you reviewed?

A Yes, sir

Q Okay And did you review any of them outside the presence of your counsel?

A No, sir

Q Okay So to the extent you had discussions about the documents, it was only with your counsel?

A Yes, sir.

Q How long was your meeting on Sunday night with your counsel?

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A Approximately 30, 35 minutes

Q And where did it take place?

A Took place at my wife's office Land America.

Q And there's Christine Watts that's also a plaintiff in this case Is that your daughter?

A Yes, sir

Q And have you talked with her about the case or your transaction in preparation for the deposition?

A Yes, sir

Q Uh-huh And when was that?

A Sunday night when we met

Q Okay Was -- was she present for your meeting with counsel?

A Yes, sir

Q Was anyone else present?

A Melanie Blease

Q And is that the young lady sitting over here?

A Yes, sir

Q Is she also a plaintiff in the case --

A No, sir

Q -- do you know? No? The -- anyone else?

A No, sir

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Q Did you have any discussions with your daughter, Christine Watts, outside the presence of your counsel about the transaction or this case?

A Yes, sir

Q Oh, okay And when was that?

A Sunday night, on the way home

Q All right. And what did you discuss with her on the way home?

A We discussed primarily the taking of a deposition, what it involved and, you know, you would be asking me questions And I was trying to rehash the deposition process

Q Uh-huh.

A And --

Q And has Christine had her deposition taken before?

A No sir

Q Did you dis- -- rehash any of the details of the negotiation of the car deal or the transaction at Century BMW in this conversation outside the presence of your counsel?

A Yes, sir

Q And tell me about that. What was said on that subject?

A We discussed -- I could not remember what

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we bought the car for, the purchase of the car, because it was primarily for her as a graduation present. And all the steps

Q And by all the steps, you mean all the steps --

A All the steps in the process, trying to review the purchase of the car

Q And did the two of you refresh each other's recollections as to what went on?

A She told me how much money we paid for the car We were talk- -- I couldn't even remember the purchase price

Q Uh-huh Did she refresh your recollection about any other details of the transaction?

A No It was pretty much the conversation was towards the purchase price and how we financed the car

Q Was there anything that she didn't remember that you were able to refresh her recollection about?

A I'm thinking of the conversation, because it was brief She just mentioned that on the last page, the -- the commission statement on the car, you know, how much profit was made on the car

Q And I take it that was something you didn't know until --

A I had no idea. That's not my business

Q And the dealership didn't provide you with that information at the time of the transaction?

A No, sir

Q Okay And what did she have to say on that subject?

A That was -- they did pretty good

Q Did you have any other discussions about the transaction or the case in this ride home with your daughter on Sunday night?

A The only other thing that I can remember was that I told her I couldn't remember some of the paperwork that we had looked at

Q And that was some of the paperwork you had had the opportunity to discuss with counsel earlier in the evening?

A Yes, sir

Q Okay And since that drive home Sunday night, have you talked to her any further about the case or the transaction?

A The only thing that we talked about was last night, that we both were nervous about the deposition

Q No need to be nervous

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A Yeah

Q Okay And prior to Sunday night, within the last couple of months have you had any discussions with your daughter about the case or the deposition?

A We have not really talked about it.

Q Does she live at the same address as you?

A No sir

Q I'd like to talk a little about your educational background. Could you describe any education you've had since high school?

A I graduated the University of South Carolina with a major in journalism

Q And what year did you graduate?

A '78

Q And that's the University of South Carolina in Columbia?

A Columbia

Q And was that a bachelor's degree?

A Yes, sir

Q And since getting your bachelor's degree in 1978, have you done any further education?

A No, sir

Q Could you -- starting with when you graduated from University of South Carolina, could you just -- what was your first job after college?

A First job was working for Wallace Business Forms as a salesman. Oh, I worked for J M Fields as an appliance manager prior to Wallace Business Forms, while I was looking for a full-time job

Q Okay And J M Fields is what type of business?

A It was a retail store, similar to like a Sears They're out of business now

Q Okay And your job was with respect to appliances?

A I was selling appliances

Q Okay And was that selling appliances to consumers rather than businesses?

A Consumers

Q Did you also sell like extended warranties and the like?

A No, sir

Q And then you went to work for Wallace Business Forms?

A Correct.

Q And what was your position there?

A Sales rep

Q And what was the business of Wallace Business Forms?

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A. They designed and sold computer forms to companies
Q. And by computer forms, that would be what type of forms?
A. Continuous custom-made business forms, such as invoices
Q. And how long did you remain in the position as a sales rep for them?
A. Approximately two years
Q. So up to about 1980?
A. Yes, sir
Q. And what was your next job position?
A. I worked for Spartan Express They're a transportation company As a sales rep
Q And what would you have been selling?
A. Transportation services
Q Is that like trucking or –
A. Trucking.
Q And how long did you remain in that position?
A. Approximately two, two and a half years
Q So we're up to about 1983ish?
A. Give or take, yes, sir
Q. And what was your next job position?
A. I went to work for AAA Cooper

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Transportation, trucking company, sales rep
Q And were you again selling trucking services?
A. Yes, sir
Q And how long were you in that position?
A. I was in that position for four to five years
Q. So we're up to 1988ish?
A. Yeah.
Q And then what did you do?
A. I moved to Columbia with AAA Cooper I was still working for AAA Cooper
Q Oh, okay And when you moved to Columbia, did you take on a different position?
A. I was primarily in sales for the first year It was a new territory
Q And you said for the first year Did you – did you change positions after a year?
A. They opened a terminal, and I became terminal manager
Q And that was about 1989?
A. Yes, sir Approximately, you know
Q What were your job responsibilities as terminal manager?
A. To hire employees

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Q Did you also manage them –
A. I man- –
Q. – once you hired them?
A. I managed the employees. I was responsible for the entire operation.
Q. And how many employees were you responsible for at the terminal?
A. 45
Q And how long did you remain in the position as terminal manager?
A. Until nineteen-ninety- – 1999 Approximately
Q And what did you – what position did you take on in 1999?
A. Sales manager for environmental accessories
Q And what type of environmental accessories are you referring to?
A Environmental accessories, we sold – we were a broker, and we sold services to industry for handling their non-haz and hazardous materials
Q. And how long were you in that position?
A. To 2004 Approximately
Q Okay And what was your next position?
A. I went to work for W W Grainger

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Q And what business are they in?
A. Industrial sales
Q And what was your position with W W Grainger?
A. Government sales
Q And what would you have been selling?
A. Nuts, bolts Industrial maintenance supplies
Q And I thought I had heard you say before that you still work for AAA Cooper today
A. No, sir
Q Okay I misheard. How long were you with – or are you still with W W Grainger?
A No sir
Q Okay What was your next position?
A. Next position, I left W W Grainger, and I presently work for Bilt Rite Corporation
Q Bilt Rite?
A. Bilt Rite Yeah
Q And how do you spell Bilt Rite?
A B-I-L-T, R-I-T-E.
Q Two words?
A. Two words
Q And what was your first position with Bilt Rite?

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A. I'm a sales rep, and manager in Greenville
Q. And what is the business of Bilt Rite?
A. I call on contractors and sell garage doors
Q. And is that garage doors for residential?
A. Residential
Q. And that's your position today?
A. Correct.
Q. Aside from working for Bilt Rite do you do any other work?
A. I teach fly fishing.
Q. And where do you teach that?
A. Clemson University
Q. And how long have you done that?
A. Two weeks
Q. Aside from your recent two-week stint teaching fly fishing, have you ever taught any courses before?
A. Not besides fly fishing.
Q. Okay But you've taught fly fishing before?
A. I've taught fly fishing classes
Q. And what department is fly fishing in at Clemson?
A. Leisure Skills.

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Q. And I think you said you're married?
A. Yes, sir
Q. And your wife's name is Phyllis?
A. Correct.
Q. And is she employed?
A. She is employed with Land America.
Q. And what does she do?
A. She's a branch manager
Q. And what business is Land America in?
A. Title insurance
Q. How did you first come to meet the lawyers who are representing you in this case?
A. Melanie Blease was my daughter's roommate at the College of Charleston
Q. And Ms Blease is, I understand, a paralegal for the Plaintiff's law firm?
A. Yes, sir
Q. So did your introduction to the lawyers come through your daughter?
A. Yes, sir
Q. And as you understand it, your daughter's introduction to the lawyers came through Ms Blease?
A. Correct.
Q. When was the first time you purchased an automobile?

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A. In high school
Q. And how many automobiles have you purchased in your life?
A. Approximately 10, 12.
Q. And have those all been from automobile dealerships?
A. Yes
Q. And in this 10 to 12 car purchases you've made in your life, did you negotiate the price in each of them?
A. Yes, sir
Q. And did you always realize when you were buying the car that, you know the price is negotiable at a car dealership?
A. I try to make it negotiable
Q. Have you ever been – have you ever had an automobile transaction which the dealership refused to negotiate on the price?
A. They refused up to a point.
Q. In other words, the negotiations reached a point where they said we won't take a penny less
A. Correct
Q. But up to that point, they negotiated
A. Correct.
Q. And then you had the choice as to whether

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you were going to buy the car or not.
A. Yes, sir
Q. In connection with – putting aside your transaction at Century BMW, is the transaction that brings us here today the only time you've ever had a deal with Century BMW?
A. Yes sir
Q. Okay Prior to Century BMW, had you ever signed an arbitration agreement in connection with a car purchase?
A. I do not remember
Q. Did you, also, in the relatively recent past, buy a car at Toyota of Greenville?
A. Yes, sir
Q. And do you know if there was an arbitration agreement included with that transaction?
A. No, sir
Q. You don't know or –
A. I don't remember I –
Q. Okay Prior to your transaction at Century BMW had you ever signed an arbitration agreement in any context?
A. I don't believe I have
Q. Have any of your employers ever asked you to sign an arbitration agreement?

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A. I don't remember I don't think so
Q. Okay When you were the terminal manager for – was it AAA Cooper?
A. Yes, sir
Q. – did they have arbitration agreements with their employees; do you know?
A. No, sir
Q. In any of your various sales representative jobs – where I assume you entered into contracts with people to sell them products, is that –
A. Not – there were very few contracts. It was more on a purchase order basis
Q. Were there ever arbitration agreements involved in those deals, to your knowledge?
A. No, sir
Q. Have you ever been asked to sign an arbitration agreement and refused to do so?
A. No, sir
Q. Do you have an understanding of what arbitration is?
A. No, sir
Q. Do you understand it's another way of resolving a dispute other than going to court?
A. I've kind of got – I've got that idea, yes sir

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Q. But beyond that very basic idea you don't know the details of it?
A. I've never been involved, no sir
Q. So I take it you have no either good or bad impressions of the process
A. No, sir
Q. I think you just answered this, but have you ever participated in an arbitration, either as a witness or a party?
A. No, sir
Q. I think you testified the vehicle you purchased at Century BMW was a graduation present for your daughter?
A. Yes, sir
Q. To the extent there was a search for a vehicle to purchase for your daughter, who conducted it primarily; was it you or her?
A. She did
Q. And what, briefly, do you understand she did in that process?
A. Looked on the internet, told her friends, asked her friends and just looked at body styles in the internet
Q. Were you specifically looking for a used vehicle?

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A. No, sir
Q. Were you specifically looking in a certain price range?
A. She wanted a convertible
Q. And did you pretty much leave the search for the convertible to her?
A. Yes, sir
Q. Okay. And did you understand in the market for used vehicles, there are a number of different places you can buy a used vehicle from?
A. Yes, sir
Q. You understand that you don't even have to go to a car dealership, you can buy it from a private individual?
A. Correct.
Q. And there are ads in the newspaper you can look to for vehicles?
A. Yes, sir
Q. There are internet sites, like Craig's List and others, that – where people post cars they're selling?
A. Yes, sir
Q. Specialized publications like – in D C , it's called Auto Trader, but where they have nothing but car ads in them?

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A. Yes, sir
Q. You can also go to new car dealerships
A. Yes, sir
Q. And I take it there are a number of new car dealerships in the Greenville area?
A. Yes, sir
Q. So you weren't limited to going to Century BMW by any –
A. No, sir
Q. Also, are you familiar with used car dealerships like CarMax?
A. Yes sir
Q. And do you know where – did you go to any other dealerships in the search for a graduation present?
A. Reluctantly
Q. Okay How many dealerships did you visit?
A. Two
Q. And is that two in addition to Century BMW or two –
A. Yes
Q. Okay What were the other two?
A. Fairway Ford and CarMax
Q. And did you do anything other than look at cars at either of those dealerships?

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A. We made an offer
Q. At both?
A. No, sir. At Fairway Ford.
Q. And is Fairway Ford here in the Greenville area?
A. Yes, sir.
Q. And do you remember what type of vehicle you made an offer on?
A. Ford Mustang.
Q. I take it that it was a convertible?
A. It was a convertible.
Q. And did you engage in price negotiation back and forth?
A. Yes, sir.
Q. And I take it you didn't buy the car.
A. No, sir.
Q. And why was that?
A. We had -- I'm going -- we had -- I had talked to a gentleman at a Greenwood Ford dealership first on a car, told him what my daughter was looking for. And I do not remember how I engaged in conversation with him. And he found one, and he was negot- -- we were negotiating price. And my daughter had gone by Fairway Ford and driven the car. And they came up with a less -- a cheaper

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price, the dealership in Greenwood, than we could have bought it at Fairway Ford. And then when they found out my daughter had driven the car, they wouldn't sell it to me, so I walked.
Q. They said --
A. It --
Q. Okay. You engaged in price negotiations with the Greenwood dealership?
A. Yes, sir.
Q. And when they found out you had test driven a car at a different dealership, they wouldn't sell you a vehicle at their dealership. Is that --
A. Pretty much, in a nutshell.
Q. Did they give you a reason for that?
A. Pretty -- they were trying to protect the other dealership, Fairway Ford.
Q. Did they co-own or --
A. I don't know. I -- you know, I walked.
Q. Okay.
A. I didn't get into any of the specifics. I just -- I left.
Q. And did you -- had you engaged in any price negotiations at Fairway Ford?
A. I hadn't. I --
Q. So how did you know the deal was cheaper at

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the Greenwood dealership?
A. I went on the internet and was just looking at cars. And naturally, I got tagged from the dealership in Greenwood when -- in my search.
Q. Okay. So you gave like contact information, and they called you?
A. Yes, sir.
Q. How long did you spend doing research on the internet?
A. Very little.
Q. Had you ever been to Century BMW before you bought the car?
A. We had test driven a car there.
Q. And was that in connection with the same search, or was it a prior vehicle?
A. No, sir, it was a prior vehicle.
Q. Okay. And when was that?
A. Six months or a year prior to buying the vehicle.
Q. So was that in connection with the search for the car you ended up buying at Toyota of Greenville?
A. No, sir.
Q. For whom were you looking for a car when you test drove the car at Century BMW six months

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ago?
A. Nobody. My daughter wanted to test drive the four-door convertible, so we did.
Q. Did you engage in any price negotiations the six months earlier?
A. No, sir.
Q. And was that a new or used vehicle she --
A. It was --
Q. -- wanted to test drive?
A. It was new.
Q. When you came to Century BMW in connection with the purchase of the 2004 Z4, had your daughter already been there?
A. No, sir.
Q. Did you come together?
A. Yes, sir.
Q. Okay. And when you came, did you already have a car in mind?
A. No, sir.
Q. Once you got to the dealership, did you walk around the lot and look at a lot of different cars?
A. Yes, sir.
Q. Okay. Tell me about that. How many cars did you look at?

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A. I don't remember We didn't test drive -- I don't remember if we test drove any besides the Z4
Q. And did you walk around the lot on your own, or were you accompanied by someone else other than your daughter?
A. We were accompanied by a salesperson
Q. Okay Was that a male or a female?
A. Female
Q. Do you remember her name?
A. No, sir
Q. And did she describe the various cars to you?
A. Yes, sir
Q. Did you like her?
A. She was nice
Q. Okay So I take it she didn't put undue pressure on you as you were touring the lot?
A. No sir
Q. Okay How did you come to -- I think you said you test drove the Z4
A. Correct
Q. Did you test drive it, or your daughter, or both?
A. We both test drove it

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Q. And did the salesperson accompany you?
A. I think she -- if I -- I think she accompanied my daughter, and I think my daughter and I drove it.
Q. After test driving the vehicle, did you determine you wanted to buy it?
A. I let my daughter make the decision.
Q. Okay Did she express an interest in purchasing the car?
A. Yes, sir
Q. Okay Did she like the car?
A. Yes, sir
Q. And at that point, did you engage in any price negotiations with anyone at the dealership?
A. Not right then We went back and talked about it.
Q. Okay So you test drove the car and decided you liked it, and left.
A. Correct.
Q. Okay And why did you leave rather than stick around and negotiate the purchase right then?
A. We wanted to think about it, talk about it, and I wanted to call the credit union and check on financing
Q. And how long after you test drove the car

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was it before you returned to negotiate the deal?
A. Probably -- I think -- I can't remember it was within a day.
Q. Were you aware that the dealership would likely offer you financing on the vehicle?
A. Yes, sir
Q. But you preferred to finance it elsewhere?
A. Yes, sir
Q. So I take it you understood you didn't have to enter into a financing agreement with the car dealership in order to purchase the car
A. Yes, sir
Q. Is it your general practice to finance car purchases through your own credit union --
A. Yes, sir
Q. -- rather than the dealership?
A. Yes, sir
Q. Have you ever financed the terms of a -- have you ever financed a car through the car dealership?
A. Yes sir
Q. And did you engage in negotiations on the terms of the financing?
A. No, sir
Q. You realized you were free to ask for a

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lower interest rate than what they offered you, I take it.
A. I figured they would offer me the lowest. I didn't know that their finance rate would be negotiable
Q. But in any event, you determined you were going to get financing away from Century BMW for this transaction
A. Right.
Q. When you came back to the dealership to negotiate the purchase, who did you meet with?
A. The saleslady
Q. And was it the same saleslady you dealt with previously?
A. Yes, sir
Q. And when you came back, did you come back alone or with your daughter?
A. We negotiated via telephone
Q. Okay So you didn't come into the dealership?
A. I did not come -- I called, and we negotiated over the telephone.
Q. Okay
A. And then once the price was agreed upon, we went from there

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Q And is the reason you dealt with them by phone, was it because you felt more comfortable being at home rather than being at the dealership with the employees?
A. You know, I don't know why we did it from the house
Q Who was on the phone when you were negotiating the price?
A. The saleslady and I
Q Okay Was Christine on an extension, or was it just you and the salesperson?
A. It was just me and the salesperson
Q Okay Who called –
A Christine was in the room
Q Okay So she may have overheard – I take it the salesperson wasn't on a speakerphone in your house
A. No, sir
Q Okay So Christine may have overheard your side of the conversation, but she wouldn't have heard the other side?
A. Correct
Q Okay Who initiated the phone call?
A. I did.
Q Okay And did you ask to speak to the

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saleslady?
A. Yes, sir
Q And did – when you called, did you tell her you were interested in getting the Z4?
A. Yes, sir
Q And did you make an offer on the vehicle?
A. Yes sir
Q Had there been a – any sort of price on the car?
A. Yes, sir I don't remember what it was
Q Okay Do you remember how it was posted on the car? Was it written in shoe polish, or was it on some sort of sticker?
A. I don't remember
Q Okay And had you discussed that price at all with the salesperson when you were back at the dealership?
A. No, sir
Q So you called – I think her name is Elizabeth Courtney does that ring a bell?
A. Sounds familiar
Q Well, whoever it was, you called –
A. Yes
Q. – the salesperson, and you made an initial offer

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A. Correct
Q. And what did she say? Do you remember what your initial offer was?
A. No, sir
Q Was it, I take it, less than you ended up paying?
A. More than likely
Q But you don't recall?
A. I do not remember
Q Okay And did you have – when you made the call, did you have a bottom-line figure in mind that you wouldn't pay more than?
A. Yes, sir
Q Do you remember what that was?
A. I'm feeling my brain 30 – it was 31, 32, somewhere right in there
Q Okay
A. I do not remember exactly
Q And you knew – you knew that if the dealership, for whatever reason, didn't offer terms that you were comfortable with, you could hang up the phone and you weren't under any obligation to purchase the vehicle from them, is that fair?
A. That's fair
Q Okay And that would include terms other

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than the price, such as if they refused to offer you a warranty on the car, you could hang up the phone and not have to deal with them, is that fair?
A. Yes, sir
Q Okay Do you recall what Ms Courtney's response was to your offer?
A. There was negotiation I don't remember the interaction
Q Was it all in one phone call or multiple phone calls?
A. No, sir there were multiple phone calls
Q Okay After you made your offer, did she say, I'll have to get back with you and call you back?
A. All I remember is there were multiple phone calls back and forth
Q Okay And did all of this take place in one day?
A. Yes, sir
Q Okay Do you generally recall over what time period, how many hours or –
A. It was late afternoon.
Q Was it a weekend?
A. It was a Friday afternoon.
Q. And did you talk with anyone other than

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Ms Courtney?
A. No, sir
Q. And eventually in this back and forth phone calls, did you reach an agreement on price?
A. Yes, sir
Q. And then did you come into the dealership to finalize the paperwork?
A. After I did my credit ap and got my financing in order
Q. From the credit union?
A. Correct.
Q. So did you come into the dealership with a cashier's check from the credit union?
A. I came in with some paperwork that they needed to fill out, and the credit union verified the funds would be sent to them
Q. The credit union --
A. Verified the funds would be sent.
Q. So you didn't have a check?
A. I did not have a check.
Q. And I assume you signed a promissory note or financing agreement with the credit union?
A. Yes sir
Q. Do you maintain -- still have a copy of that?

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A. Probably so
Q. Are you still making payments on it?
A. She is, yes, sir
Q. So your daughter is making the payments?
A. Yes, sir
Q. Who was the -- were you the borrower on the financing agreement, or were both of you, or how was that arranged?
A. She co-signed with me
Q. Okay Do you recall whether -- did you enter into any other agreements with the credit union? Did they offer you any sort of service agreement on the car or anything like that?
A. No, sir
Q. Did the financing agreement that you signed with the credit union contain any arbitration clause?
A. I do not know
Q. Did you check with the dealership as to whether they could give you a better interest rate than the credit union was giving you?
A. I like my credit union, and past experience their rates have always been very, very competitive
Q. When you came into the dealership with your

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paperwork from the credit union, did you engage in any further negotiations with Ms Courtney, or had that been resolved at that point?
A. It had been resolved, to the best of my knowledge.
Q. And was your daughter with you?
A. Yes, sir
Q. And was this -- how many days after the back and forth on the phone was this, or was it the same day?
A. I think we came in like Monday, Tuesday of the following week. I can't remember exactly
Q. And do you recall whether -- how many dealership employees did you deal with when you came into the dealership on the following Monday or Tuesday, do you recall?
A. One There was the finance and insurance guy
Q. Okay Did you -- was Ms Courtney there?
A. I don't remember
Q. Okay So you -- as best you recall, the -- you went back and dealt with the F and I manager?
A. Yes, sir
Q. And was that a male or a female?
A. Male.

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Q. Do you remember his name?
A. No, sir
Q. Did that gentleman attempt to sell you any further products beyond the car?
A. Yes, sir
Q. Did he attempt to sell you a number of products beyond the car?
A. I think so.
Q. Let me show you a document I'll have marked as Michael Watts Exhibit 1 It's actually a collection of documents
(Defendant's Exhibit 1, Dealership transaction documents, was marked for identification)
BY MR. BLACK
Q. And Watts Exhibit 1 is Bates Numbered CBM 501 through 45. And if you could thumb through that exhibit, Mr Watts, can you confirm that those are the documents you were shown Sunday night?
A. Yes, sir
Q. If you could turn to the second page of the Exhibit, which is CBM-00002. Five 0's Do you see -- and this is a document entitled Century BMW Menu of Investment Enhancements Do you see that?
A. Yes.

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Q And is that your signature down at the bottom right-hand corner?
A Yes sir
Q And were you shown this document by the F and I manager?
A Yes sir
Q Does the name Corey James ring a bell as to the name of the F and I manager?
A I don't remember, sir
Q And did Mr James go through this document with you?
A I don't remember
Q Do you – you said you recalled him trying to sell you some products Do you recall him trying to sell you a service contract/extended warranty?
A We wanted that, yes, sir
Q You wanted an extended warranty?
A Yes, sir
Q Did you purchase one?
A Yes, sir
Q Did you purchase it from the dealership?
A Yes, sir
Q Okay You sure?
A I thought we did
Q If you turn to the next page, you see the

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car was still covered by the BMW warranty?
A We bought – excuse me We bought the extended warranty after the car was – came out of warranty I knew we had an extended warranty
Q Okay
A I apologize there
Q So in the – when Mr James or the F and I manager went through the products with you, you didn't buy an extended warranty on the day you purchased the car?
A Correct
Q But you did buy an extended warranty sometime thereafter
A Yes, sir
Q And from – did you buy it from the dealership?
A Yes, sir
Q Okay But at the time of your sale, you turned him down on buying it
A Yes sir
Q Okay So I take it you knew it wasn't a requirement of purchasing a vehicle at Century BMW that you enter into a service agreement with the dealership
A Correct

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Q Did he also try and sell you this tire and wheel guaranty that's referenced on the form?
A That's the one I remember
Q Okay
A Yes, sir
Q And you didn't purchase that?
A No
Q Okay Did he try and sell you this upgraded maintenance agreement referenced here in the middle column, the top?
A I don't think – the upgraded maintenance agreement, he discussed it, and it's the one we came back and bought later
Q Okay And I notice here that someone has scratched through the 1695 and written 1395 by hand Do you see that?
A Yes, sir
Q And in trying to convince you to purchase this item did he offer to lower the price from what was on the menu?
A He must have
Q So I take it you understood that these various items, the price was negotiable on them?
A No, sir, not really
Q But you did understand that it wasn't a

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requirement of purchasing a vehicle that you enter into any of these agreements referenced on the form.
A Yes, sir
Q And down at the bottom of the page, is that your handwriting that says, declined coverage, or is that the F and I manager's?
A That's the F and I manager
Q And you signed next to that?
A Yes sir
Q Do you recall how long after you purchased the car you came in to buy the service agreement?
A It was before the 50 000-mile warranty ran out.
Q So it was some number of months after you purchased the car?
A A good number of months, yes, sir
Q How long do you recall him pitching these products to you for?
A I can't remember how long.
MR BLACK Can we take a break?
MR THOMAS Yeah, I was about to ask.
(A recess transpired)
BY MR BLACK
Q You mentioned that your daughter was roommates with Ms Blease That was in college?

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A. Yes, sir
Q. And did your daughter graduate from college in 2005?
A. Christy graduated in 2004, I believe
Q. Okay So it was the year -- it was a year after she graduated that you purchased the car?
A. She graduated -- she finished -- she stayed down there and finished her master's, so maybe it was 2005
Q Okay And had she been rooming with Ms Blease up until she got her master's degree?
A. Yes, sir
Q. Was she --
A. Up to a point. She -- I don't exactly remember I think her last year, she lived by herself
Q So as you understood it, she had been a roommate of Ms Blease up to sometime in -- when did she stop being Ms Blease's roommate, as you understand it?
A. Christy had roommates, and the biggest thing I remember is having to move her all the time. Okay? I think Christy roomed with Melanie Blease 2003, 2002, somewhere like that.
Q And did they remain friends after they

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stopped being roommates?
A. Yes
Q And are they still friends?
A. As far as I know, yes
Q. And do you know if Ms Blease -- do you know when she graduated, if she's graduated?
A. No, sir
Q Okay Do you know while she was at school with your daughter, was she working for the law firm at the same time?
A. I don't think so I know Melanie has always held jobs, but I don't know where she was working.
Q Okay So she may have been working for the law firm you don't know one way or the other?
A. I don I know
Q Okay You said you purchased the service agreement after you purchased the car
A. Right.
Q And I think you said you purchased it before the car hit the 50,000-mile mark?
A. Correct.
Q. At the time you purchased it, was the car approaching the 50 000-mile mark?
A. Yes sir

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Q If you turn to Page 000005, do you see that's an Affidavit and Notification of Sale of Motor Vehicle?
A. Yes, sir
Q. And do you see that there's a certification that the odometer, at the time you purchased the vehicle, read 15,514?
A. Yes, sir
Q. So I take it if the car was approaching 50 000 miles at time you bought the service agreement, it was a significant period of time after you purchased the car
A. Yes sir
Q And someone had put approaching 30,000 miles on the car in the interim?
A. Yes, sir
Q. So I take it it was over a year after you bought the car?
A. Yes, sir
Q. So it was after this litigation was filed.
A. Before the litigation was filed.
Q Well, you bought the car in June of '05, is that right?
A. Yeah.
Q. And this litigation was filed in August of

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'06?
A. Okay It had to have been. I'm not good on dates. I apologize I don't -- I am not good on dates, trying to time line everything
Q. Okay It -- but would you agree that it's likely you bought the service agreement after you -- after the litigation was filed?
A. Yes sir
Q When you met with the F and I manager, where in the dealership did you meet with him?
A. In his office.
Q And was that a cubicle-type office off the showroom floor?
A. Yes sir
Q And did you meet with him alone, or was Christine with you?
A. Christine was with me
Q And was she there the whole time?
A. With the F and I manager?
Q Yes
A. Yes, sir
Q And do you recall how much time elapsed from the moment you walked into the F and I office until you left?
A. I do not remember

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Q Was it over an hour?
A I tried to keep it as short as possible
Q Okay
A So I don't -- I don't remember
Q You wanted to get in and out as quickly as possible?
A Correct Yes sir
Q So was it likely less than an hour?
A Yes, sir
Q And what was your impression of the F and I manager? Was he a nice guy?
A He seemed like an all right guy
Q He didn't put any undue pressure on you?
A No, sir
Q And to the extent he tried to sell you things, you didn't buy them, at least at the time
A Correct
Q Did you sign some documents while you were in the F and I office?
A Yes, sir
Q Do you know how many?
A No, sir
Q Do you have an estimate of how many?
A Five, six
Q So it wasn't some huge stack of documents

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you had to sign; it was just a handful.
A There were copies and stuff That's all I can remember
Q Okay But you don't remember having to traipse through some enormous stack of documents?
A Not a huge stack of documents
Q And were the documents such things as transferring title to the vehicle and the like?
A Yes, sir
Q And those documents, you understood, were required by law?
A Yeah, they were all -- all the documents were right there together
Q And the documents you were given to sign, did Mr James do anything to prevent you from reading them?
A No, sir
Q And if you'd turn to Page -- the page that ends in 14 And do you see that that's a document that is titled, in all caps and bold print at the top, Arbitration Agreement?
A Yes sir
Q And would you agree with me that the heading of the document is easy to read?
A Yes, sir

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Q And the -- at the bottom of the page, have you signed the document?
A Yes, sir
Q And right -- right above you, where your signature is, do you see in bold, all caps, it says By signing below, the parties acknowledge that they have read and agreed to the terms of this arbitration agreement?
A Yes, sir
Q And do you agree with me that that's easy to read?
A Correct
Q And immediately above that, there are a number of bullet points that are also in all caps?
A Yes, sir
Q And that's in perfectly readable type?
A Yes, sir
Q And, in fact, the entire document, while the other type on the page may be somewhat smaller, none of it is difficult to read if one wanted to?
A Correct
Q I think we said that's your signature in the bottom left-hand corner in the top signature line?
A Yes, sir

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Q And is that your daughter's signature below that?
A Yes, sir
Q And that's the -- Mr James' signature to your right?
A I would assume so, yes, sir
Q And this document was presented to you at the dealership when you were meeting with Mr James?
A Yes, sir
Q What, if anything, did Mr James say to you when he presented you with this document?
A I don't remember if he said anything
Q Did you see when he handed you this, that it said arbitration agreement at the top?
A I did not really pay it any attention, because they weren't doing any financing for me We were eager to get the car
Q So you were here to just get out of there
A Yes sir All the papers were together, and he handed me all the papers
Q Okay But he didn't do anything to prevent you from reading what he handed to you
A No, sir
Q Do you recall one way or another whether you did read it?

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A. I did not read it, no, sir
Q. Did you glance your way down and at least read the things in all caps?
A. I don't even remember signing it. Because all the papers were together
Q. So I take it you don't remember him telling you that you had to sign this document in order to purchase the vehicle?
A. No, sir
Q. And I take it, from what you've said, you didn't object to signing the document at the time
A. I didn't know I didn't have to
Q. But you didn't say, I don't want to sign this, to Mr. James, is that fair?
A. No, I did not say that.
Q. Okay
A. No, sir
Q. And you didn't raise any complaint about the document at the time?
A. No, sir
Q. And you didn't ask any questions about whether it was required that you sign the document?
A. No, sir
Q. And I take it the same -- all of those questions, same is true of your daughter?

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A. Yes, sir
Q. Okay. She didn't ask any questions about the document?
A. No, sir. She wanted the keys
Q. Okay. The credit union you financed the transaction through, what was the name of the credit union?
A. Carolina Collegiate Federal Credit Union
Q. Did you finance the purchase at Toyota of Greenville through the same credit union?
A. Yes, sir
MR. BLACK: Can we take a break?
MR. THOMAS: Yeah
(A recess transpired.)
BY MR. BLACK:
Q. At the time of your purchase from Century BMW, how many cars did you and your wife and your daughter collectively own?
A. We owned -- we bought this car. We owned two
Q. Two in addition to this car?
A. Yes, sir
Q. Okay. And what cars are those?
A. One was a Honda
Q. And who primarily drove the Honda?

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A. My wife
Q. And what other car was there?
A. I'm trying to think what I was driving. Because I've had so many company cars over the years, and they change those out so much that --
Q. Who drove the vehicle you purchased at Toyota of Greenville?
A. I did.
Q. Okay
A. I'm trying to remember the dates, if I had that car or not at that particular time, or if I had a company car. I think I had the Toyota.
Q. Okay. Was Christine driving a car prior to the --
A. Christy had a Montero Sport.
Q. That's a Mitsubishi?
A. Correct.
Q. And how long had she been driving that car?
A. Three years. Four years
Q. And was that car still in working order at the time of the Century BMW --
A. Yes, sir.
Q. -- transaction?
A. Yes, sir
Q. Okay. So aside from wanting a nice -- I

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realize it's a used vehicle, but a nice new vehicle, she wasn't under any pressure to replace her car because she didn't have a working car at the time
A. Correct.
Q. And you didn't trade that car in
A. No, sir
Q. What did -- what did you do with that Montero Sport?
A. Sold it to an individual
Q. Okay. And you did that through the internet or something?
A. Through a little car lot.
Q. And would you agree that if all that you needed was transportation around town, while that might be necessary here in South Carolina, there's no necessity of buying a luxury BMW automobile?
A. For just transportation, I agree
MR. BLACK: That's all I have
THE WITNESS: Okay
MR. THOMAS: I don't have anything
MR. BLACK: Okay
(The deposition was concluded at 10:36 a.m.)

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SIGNATURE OF DEPONENT

I, the undersigned, MICHAEL WATTS hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any

PAGE	LINE	CHANGE	REASON

_____

MICHAEL WATTS DATE

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CERTIFICATE OF REPORTER

I, Kathy P Taylor, Registered Professional Reporter and Notary Public for the State of South Carolina at large, do hereby certify that the foregoing transcript is a true, accurate and complete record

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof

WITNESS MY HAND, I have hereunto affixed my official seal this 31st day of January, 2008, at Greenville County, South Carolina.

_____

KATHY P TAYLOR
REGISTERED PROFESSIONAL REPORTER
MY COMMISSION EXPIRES
JUNE 13, 2017

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(No information was requested.)

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STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF AIKEN

HERRON, et al.,

Plaintiffs,

Case No.
2006-CP-02-1230

vs.

DICK DYER & ASSOCIATES, INC., et al,

Defendants.

DEPOSITION OF: JOHN ROBERT BISHOP

DATE: January 30, 2008

TIME: 10:07 a.m.

LOCATION: LEATHERWOOD WALKER TODD & MANN, P.C.
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Greenville, South Carolina

TAKEN BY: Counsel for Defendant,
CENTURY BMW

REPORTED BY: KATHY P. TAYLOR,
Registered Professional Reporter

Computer-Aided Transcription By:

A. WILLIAM ROBERTS, JR. & ASSOCIATES

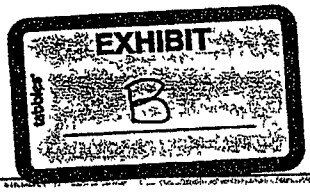
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ALSO PRESENT.
MELANIE BLEASE, Paralegal
ALISON DANNERT, Paralegal

(Index at rear of transcript)

STIPULATION

It is stipulated by and among Counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, Rule 30; that all objections as to Notice of this deposition are hereby waived; that all objections except as to form are reserved until the time of trial; and that the deponent does not waive reading and signing of this deposition.

* * * * * * * * * * *

JOHN ROBERT BISHOP,

Being first duly sworn, testified as follows:

EXAMINATION

BY MR. LEWIS.

Q. And you're Mr. Bishop, they tell me

A. Yes, sir

Q. Well, I'm required to tell you a couple of things. Have you had your deposition taken before?

A. No, sir

Q. Okay. Well, then, listen up. So when you give an answer, they're going to write it down, and so you've got to make sure you understand my question

A. Yes

Q. So if you don't understand it, you ask me

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to explain it or whatever, and I will try to make sure that it's an understandable question Is that fair?
A. Yes, sir
Q. Now, if I cut you off, because I get excited, you say, I'm not finished, and I will let you finish Or if I'm – if I'm making you mad, you say, I'm making you – you're making me mad, and I'll try to change the way I'm doing things so I don't make you mad Does that make sense?
A. Yes, sir.
Q. Now, you're going to give answers to questions that I give, and she's going to take them down. You don't get to ask me questions, thank goodness. So just understand that.
Now, have you been explained about reading and signing your deposition?
A. No, sir
Q Okay. You have the right to read your deposition and make corrections to it, like the spelling of your name or the spelling of somebody else's name. You don't get to change yeses to nos, but, you know, so you can read and sign it to make sure that it's what you think you said. But that's up to you whether you want to do that, and you can

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ask your lawyer if he would like you to do that. And you need to tell her at the end of the deposition so she can get you the deposition copy and you make whatever corrections you want.
MR. BLACK: He will read and sign, but I object to your instructions to the extent it misstates the law and what changes he can make, but go ahead.
MR LEWIS You ob- – I'm sorry You were talking –
MR BLACK: Object to what you instructed the witness.
MR. LEWIS: You were talking to the table. If you'll talk to me, I'll be able to hear you.
MR BLACK: I said I object to your instruction to the witness to the extent it misstates the law as to what changes you can make in your deposition
MR LEWIS. That's fine. I just don't think you can change yeses to nos; but if you think so, that's fine with me If you want to do that, that's okay with me, too.
Now, you ready?
THE WITNESS Ready
BY MR. LEWIS.

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Q. And what's your full name?
A. My name is Bobby Bishop Bobby is a nickname. John Robert Bishop is my legal name.
Q. And where do you live?
A. I live in Simpsonville, South Carolina.
Q. Do you know a Mr. Hawkins that lives in that town?
A. Don Hawkins?
Q. Bill Hawkins
A No, sir.
Q Okay. Now, what do you do?
A. I'm the general manager at Century BMW.
Q. General manager. Okay Have you – you know you've been designated as the person that's most knowledgeable about certain items that we asked that the Century BMW produce; do you understand that?
A. Yes, sir.
Q. And I'm going to show you Exhibit Number 1, which is our Notice.
(Plaintiff's Exhibit Number 1, Notice of Deposition, was marked for identification.)
BY MR. LEWIS:
Q. And this is the Notice. If you would turn to Page 2, you will see the areas that we're

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interested in. Do you see the person or persons most knowledgeable regarding A, B, C, and D?
A. Yes, sir
Q Which one are you – have you been identified to address?
A. A, B, C, and D
Q So you're the only one that's here.
A Yes, sir.
Q So you've been designated for all of them.
A. Yes, sir
Q. Had you seen those I- – topics before?
A Yes, sir.
Q. Who is the person second-most knowledgeable for each of those items?
MR. BLACK. Object to the form. You can answer.
THE WITNESS I'm sorry?
MR. BLACK: I said objection to form. You can answer
THE WITNESS: Oh
BY MR LEWIS.
Q He'll say that a lot, object to the form, but that just means that you get to answer, and he's just putting it on the record
A Okay

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Q. It doesn't allow you not to do it or anything.
A. Corey James.
Q Corey James? And he would be the same -- he would be for all of them, like you?
A. Yes, sir
Q. Okay Now, have you talked to anybody about each of these topics?
A. Yes, sir.
Q. Who?
A. Corey James and Elizabeth Courtney
Q. And why did you talk to Elizabeth Courtney?
A. She was the salesperson.
Q. And when you talked to Corey James and Eliz-- Corey James, did you talk to him with any documents, or was it just talking to him?
A. Just talking
Q And what did you talk about?
A. I asked him if he remembered this deal, the Watts deal.
Q. And did he remember?
A. Specifically, he did not.
Q. And so did you then stop talking?
A. I mean, if he didn't remember the deal, I asked him what his procedures were at that time.

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Q. And what did he tell you his procedures were at that time?
A You -- I'm talking about the way he rolls off the paper. Which is a car term; you know that.
Q What?
A. Rolls off the paper. He presents the paper
Q. Yeah. How does he roll off the paper?
A. He presents it one piece at a time to the customer
Q. That's what he said?
A. Yes, sir
Q. And did he tell you that he presented them in a stack with little flags on them?
A. No, sir
Q. Does he ever mention he put flags on them?
A. He said he did not put flags on them.
Q. Oh So we have a difference of opinion between the buyer and the seller.
MR. BLACK. Object to the form of the question.
A. Apparently
BY MR. LEWIS:
Q. Apparently?
A Apparently

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Q. You know that now, don't you?
A. Yes, sir.
Q. Because someone -- were you at the deposition yesterday?
A. No, sir.
Q. So someone talked to you about the deposition.
A. Yes, sir
Q. And they told you that the buyer said that there was a stack and that there were flags on them.
A. Yes, sir.
Q. And then when you went to Corey James, was that before or after you had that -- knew that yesterday they talked to -- they said that there was flags on the documents? Did you talk to Corey James about his procedure before or after?
A. I talked to him before --
Q Yeah.
A. -- and after.
Q. Okay. When did you bring up the flags to him?
A. This morning.
Q. And you asked him if that was true?
A. Yes, sir.
Q. And he said no?

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A. Yes, sir.
Q. Before that, you didn't ask him?
A. No, sir.
Q. No, sir, you -- that's a hard answer Before that you did not ask him, is that correct?
A. I did not ask him before.
Q Okay. Did he tell you he ever used flags?
A. He stated that he never used flags
Q. Never used flags. Okay. With any customer?
A. That's what he stated, sir.
Q All right. Good. All right. Now, did you -- what else -- okay Before yesterday, before yesterday, what else did Mr. Corey James say?
A. Basically he stated he didn't remember this deal at all.
Q Okay. What did he say about his procedures --
A. I --
Q -- other than he presented them, what did you say, a document at a time?
A. Yes, sir, that's exactly what he said.
Q Anything else?
A No, sir
Q Did he say what he said to the -- to the

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people?
A. He doesn't remember them, sir.
Q. Does he say what he generally -- is there some procedure where they have a specific spiel, you know, like -- you've heard spiels before You know that.
A. He would -- his procedure was to present each piece of paper and put his finger where they needed to be signed --
Q. Okay.
A. -- individually.
Q. All right. And did he say anything about the pages, or just point to them?
A. He would explain the pages and point to the signature.
Q. Did he say he explained the pages?
A. Yes, sir.
Q. Did he say that before yesterday or after yesterday?
A He said that before yesterday.
Q Okay Anything else did he say besides pointing where to sign and explained the paper?
A. No, sir.
Q. Anything else?
A. No, sir

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Q Okay. Now, we'll get to the --
MR. LEWIS: Where's the arbitration agreement?
(Plaintiff's Exhibit Number 2, Arbitration Agreement, was marked for identification)
BY MR LEWIS:
Q. You understand that Exhibit Number 2 is the arbitration agreement that -- in this deal, as you call it.
A Yes, sir
Q. And it's -- and this is one of the pieces of paper that had been rolled out?
A. Yes, sir
Q. And this is one of the papers, according to Mr James, that he would have pointed at and told them where to -- that they should sign that.
A. Yes, sir.
Q And what did Mr. James say he explained about this document, Exhibit Number 2?
A. I did not ask him what he explained with the documents
Q. You didn't?
A. No, sir
Q. So you don't know?
A. No, sir

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Q. And there's no procedure that you tell them what to explain?
A. We practice full disclosure.
Q. Well, what do you disclose? What do you tell them to disclose about this?
A. We tell them to go over the form and tell them exactly what it contains.
Q. Well, what? What does this form contain? Can you sit here and tell me what this form contains?
A. I'm not an expert, but I can tell you that this is a document providing remedy for the customer without having to go to court.
Q. Is that what you tell them when you explain --
A. Yes, sir.
Q. If you were to explain it, that's what you would say?
A. Yes, sir.
Q Is there anything else you'd tell them, other than it's a remedy for the customer and you don't have to go to court?
MR. BLACK: Object to the form You can answer.
A No, sir, I would tell them nothing else.

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BY MR. LEWIS:
Q. Okay. And is that what you expect your employees to tell the -- the people?
A. They're more informed than I
Q. Well, is that what you expect them to tell them, at least that?
A. At least that.
Q. Okay. Is there anything else you expect to tell -- them to tell them?
A. No, sir.
Q. All right. Anything else you talked to Mr. -- did we cover everything you talked to Mr. James about?
A. Yes, sir
Q. Now, what did you talk to Ms Courtney about?
A. I talked to her about the deal itself
Q Did she remember the deal?
A She did not.
Q What did she say about the papers that were rolled out?
A We talked about the arbitration and the -- I mean, she -- she basically doesn't handle any of that paperwork as far as the arbitration and stuff would go, so she had no knowledge of what the Watts

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said in the office, the F and I office, or nothing.
Q. Well, what is she? She – I thought she was the salesman.
A. Yes, sir, she is the salesperson, but all these transactions are conducted in the F and I office.
Q. So the salesperson doesn't do any of the roll out of papers.
A. No, sir.
Q. So she just tries to sell the car; and then when she says okay, there's a point in the sales process, I got to get them into the guy that rolls out the paper.
A. Yes, sir, exactly right.
Q. And when is it you get to go – you have to go in to roll out the paper? How long and where in the process does that happen?
A. At the very end
MR. BLACK: Object to the form.
BY MR LEWIS:
Q. Huh?
A. At the very end of the process.
Q. So you've already negotiated a price at that time?
A. Yes, sir.

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Q. And then you roll – you go in, and they roll out the paper.
A. Yes, sir.
Q. And all – Ms. Courtney doesn't explain any of the papers to the people; that would be in Mr. James' area.
A Correct.
Q Is Mr. James the one that explains it to all the customers, or are there more people that work for or under Mr James?
A At that time, Corey was our only F and I manager.
Q. The what?
A. He was the only F and I manager, so he –
Q F and I?
A. Yes, sir, finance and income manager
Q. Okay And so he was the one that rolled out the paper
A Yes, sir.
Q. And – and you talked to Elizabeth Courtney, and did you talk to her both before and after yesterday?
A. I have no reason to talk to her this morning.
Q. Okay. And so you talked to her before, and

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she doesn't remember this deal, and she doesn't do any of the paper.
A. Yes, sir.
Q. So she has nothing to do with this arbitration at all.
A. No, sir.
Q. Does she know what an arbitration agreement is? Is she ever schooled on it?
MR. BLACK: Object to the form.
A. As far as general knowledge, she does know about it.
BY MR. LEWIS:
Q. Well, does she mention it, or do you tell her that she's supposed to tell the customer?
A. She's not supposed to tell the customer. She has no reason to tell the customer.
Q. So she is specifically not to tell the customer about the arbitration?
A. Not specifically not. She has no reason to discuss it
Q. So you don't tell her to bring it up?
A. No, sir.
Q. Okay. When Mr. Courtney James has that piece of paper, the arbitration agreement, and he – you say he presents it to the customer.

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MR BLACK: It's Corey James.
MR. LEWIS: What?
MR. BLACK. It's Corey James. Courtney is the last name of the salesperson.
MR. LEWIS: Corey?
MR. BLACK: Corey.
MR. LEWIS. Okay. Every time I said Courtney, I meant Corey
MR. BLACK. I think you said Corey every time except that last time.
MR. LEWIS: Well, I appreciate you helping me out there.
MR. BLACK: No problem
BY MR. LEWIS.
Q. Okay. Mr James. How about that? Mr James, when he does the papers – we've already talked about that. He does the arbitration paper. Does he tell them that they don't have to sign it?
A No, sir
Q. Does he – when he points and tells them to sign here, does he say, this is where you have to sign?
A No, sir.
Q What does he say?
A To my knowledge, he says nothing

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Q. So he just – he says what we said he said about the agreement, and then he puts his little finger down there, and that's supposed to indicate that they sign, and he doesn't say anything.
MR. BLACK: Object to the form
BY MR. LEWIS:
Q. Is that right?
A. I don't understand exactly what you're asking me here.
Q. Well, we told – we already went over what he told – what the minimum was he had to tell people, what you said.
A. Correct.
Q. All right. And you said that he points to where they sign.
A. Yes, sir.
Q. I want to know what he says when he points to where they're – he – they sign. Does he say, you have to sign here, sign here, or you don't have to sign, but we want you to sign? What does he say?
A. I don't know his exact verbiage.
Q. Well, what did you all tell him to say?
A. Sign here.
Q. Okay. But he doesn't tell them they don't have to sign.

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A. No, sir.
Q. What if they won't sign?
A. Then we still sell them the car
Q But you don't tell them?
A. No, sir.
Q. Now, how many people have refused to sign the arbitration agreement?
A. I can't tell you an exact number.
Q. Have there been any?
A. Yes, sir.
Q Do you keep a count of them?
A No, sir
Q. Do you flag the deal differently?
A. No, sir.
Q. You just go right on through, and if it's signed, it's okay, and if it's not signed, it's okay.
A. Yes, sir
Q. Why do you want them to sign it?
A I think it's good for the customer.
Q. You do? Why do you think it's good for the customer?
A. It's just, to me, a better way of settling differences.
Q. Than what, court?

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A. Yes, sir. Faster.
Q. It's faster, you say?
A. Yes, sir.
Q. And it's secret. Did you know that?
A. No, sir.
Q. You didn't know that?
A. No, sir.
Q. Do you know what the rules of the arbitration agreement are?
A. As pertaining to –
Q. How – the process.
A. Vaguely.
Q. How you do it Vaguely?
A. Yes, sir.
Q. Well, what are your vague understanding? Now, what's your job; you're the general manager?
A Yes, sir.
Q. Okay. Does Mr. Courtney James know anymore about how arbitration works than you, or would you say you're better?
MR. BLACK: It's Corey James.
MR. LEWIS: Corey James. Mr. James.
A. I would say neither one of us would be involved in the process or actually been through the process.

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BY MR. LEWIS:
Q. Or know anything about it?
A. Not much.
Q. Or what the rules are or what you have to do; do you know any of that?
A. No, sir.
Q Do you know who has to pay for arbitration?
A. I understand that we pay a large percentage of it going in.
Q. Who – who told you that?
A. It's in here.
Q. Did you know that before yesterday?
A Yes, sir.
Q. Did you know it before a week ago?
A. Yes, sir.
Q. You just – did you always tell the customer that?
A No, sir.
Q Now, you say a large percentage; what's the percentage difference you pay?
A. I think we pay up to $1500 to start it out, and then at some point we'll assume a lot more responsibility
Q. Does the customer have to pay any?
A I can't answer that.

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Q. You don't know?
A. No
Q. Do you know how you choose an arbitrator?
A. No, sir.
Q Did you talk to anybody other than Mr. James and Ms. – Elizabeth about the deposition other than the lawyer?
A. No, sir.
Q. We – that agreement, Exhibit Number – that's before you, it's Exhibit Number 2, how long has that been the arbitration agreement for your company?
A That actual version, I cannot answer to that
Q. Okay. Was it – how – is it the same version that it is now?
A. From 2005 until now?
Q Uh-huh.
A. I would – I couldn't tell you
Q. Well, and how far back from 6/25/05 was this agreement being used?
A. That actual agreement, I don't know. It has evolved over the years
Q. Well, who would know?
A. Sonic Automotive.

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Q. Sonic Automotive?
A. Yes, sir.
Q. It's hard to talk to Sonic Automotive Is there somebody in particular?
A. Richard O'Connor
Q Richard O'Connor?
A. Yes, sir
Q Who is Richard O'Connor?
A. The national F and I director.
Q. The F and I director?
A. Yes, sir, national.
Q Well, we have a national F and I director, and that's who Mr James would be under.
A. Yes, sir
Q Does it come – is he under you, or is he under this – what's his name?
MR. BLACK: I assume you're – I don't mean to – I assume you're asking back in 2005?
MR. LEWIS. Well, I'll ask – if you want me to, I'll ask in 2005
A. In 2005, Corey would have worked directly for me, and he also would have worked for Richard O'Connor indirectly
BY MR. LEWIS:
Q. Is that different now?

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A. No, sir.
MR. BLACK: Mr. James doesn't work at the dealership anymore, which is why I made the objection, but –
BY MR. LEWIS:
Q. Where is Mr James?
A I understand yesterday he left the company, so I have no idea where he is now.
Q He left the company yesterday?
A. Or I heard it yesterday that he left the company.
Q. Where does – where do you work?
A. I work for Century BMW in Greenville
Q And where does this Corey – this guy named Mr James work?
A. His last position was in a Sonic store in Charlotte, North Carolina
Q. And when it – when – in 6/25/05, he was in your store?
A. Yes, sir
Q. And he was moved from your store up to someplace in Charlotte?
A. Yes, sir
Q. And he left Charlotte yesterday?
A. I heard that he left Charlotte yesterday.

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I don't know exactly what day he left.
Q. I thought you talked to him after the deposition.
A. I didn't ask him.
Q. Wait a minute. I got to understand this. You called him after the deposition, right?
A. Yes, sir.
Q. And – but you didn't ask him where he worked?
A No, sir
Q. Did you know at the time he didn't work for Sonic?
A. Yes, sir This morning.
Q. And – but you called him. Where did you call him?
A I called him on his cell phone.
Q. And you didn't say, hey, where are you working now or what are you doing?
A No, sir.
Q Why wouldn't you – that's just befuddling to me That's just – you just didn't care
A. No, sir.
Q You didn't care.
A. No, sir.
Q. You don't like that guy?

A. I like him, but I don't care where he's working.
Q. Huh. Where is his cell phone number?
A. It's in my car.
Q Your car?
A. Yes, sir.
Q. Would you mind giving us that?
A. (704)577 – wait a minute.
MR. BLACK: Let me consult with co-counsel.
A. I may. I may
(A discussion was had off the record and out of the hearing of the court reporter.)
MR. BLACK. Go ahead
BY MR. LEWIS.
Q. 705 what?
A. 704
Q. Oh, okay.
A. (704)577-5935.
Q. Okay. How many cars per year does BMW sell?
A. Approximately –
MR. BLACK. BMW?
BY MR. LEWIS
Q. Century
A. Approximately 1200.

Q. And since 2005 or – 5, since this agreement here, how many of those cars did anybody refuse to sign an arbitration agreement on?
A. I don't know that number, sir
Q Do you know of one?
A Yes, sir.
Q. You do?
A. Yes, sir
Q. Who was that?
A. Brad Martin.
Q And who is Brad Martin?
A Our attorney.
Q. Oh Okay Now, give me one more
A. I cannot give you another name
Q. Okay. Thank you. Is it – the fact that you use arbitration agreements is something that Sonic, above you, makes that decision; it's not the decision of your store?
A That's correct.
Q. Huh?
A That's correct.
Q. So there's some higher-up, this – what was his name, Mr. –
A. O'Connor
Q Yeah, Richard O'Connor And his – now,

does he send down a – is there some kind of booklet that they send down or a manual that they send down telling everybody how to go through the rolling of paper, how you do it, what you do, what they're for; is there some I could go get it?
A. No, sir, it's all done in training classes.
Q. In training classes where?
A. Various places. Atlanta, Charlotte.
Q. Is all the training the same?
A. Yes, sir
Q. So you would think, then, just logically, that there is somewhere there is a training manual.
A. I don't have one in my possession.
Q. I know you don't, but –
A. I don't know of one.
Q. Well, how – when they go up there, do they have little – you know, this is the age of PowerPoint. Do you have little PowerPoints and they show a form and they tell about it? Have you ever been to these –
A. I've never been to a session for F and I.
Q. You never have?
A. No, sir.
Q. So I guess the person that would know that would be Mr. O'Connor?

A. Yes, sir.
Q. And where is he located?
A. Charlotte, North Carolina.
Q. Where?
A. It's Sonic headquarters. 6415 Idlewild is the address
Q. You're pretty good on this stuff, remembering stuff. How old are you?
A. Do I have to answer that? 51
Q Pretty good for 51 So Sonic – Sonic, this – what do you call the headquarters, Sonic?
A. Yes, sir
Q. Okay Sonic, they make the decision to use the arbitration agreement.
A. Yes, sir
Q And you don't know why they made that decision.
A. No, sir
Q And you don't know what was the considerations in that.
A. No, sir.
Q. And as far as you know, there is nothing in your dealership that says that or gives an explanation or tells Mr James how to conduct his rolling of paper.

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MR. BLACK: Object to the form.
A. You're talking about a written document that explains it?
BY MR. LEWIS:
Q. Uh-huh.
A. No, sir.
Q. Or – or any kind of guidelines for him, how does he do it.
A. No, sir.
Q. How does he know – there's a packet of documents, isn't there?
A. Yes, sir.
Q. And for every – say, oh, this is what we call it, a packet, or you roll out this packet. Right?
A. Yes, sir.
Q. And the packets are the same for all sales.
A. No, sir
Q. What's the difference?
A. Well, there's different kinds of contracts for different kinds of deals, lease versus retail.
Q. All right.
A. The basic paperwork would be the same.
Q. Okay.
A. But there would be different retail and

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lease contracts.
Q. Other than the retail versus lease, would the rest of it be the same?
A Yes, sir.
Q. Would the arbitration agreement be the same?
A. Yes, sir.
Q. Now, so we know that there is a packet for a lease or a sale. Let's suppose it's a sale. This packet, do you keep the little packets together, like he grabs a packet, or does he have to go through and grab every one of them? How does it work?
A. Each individual They're not stored as a packet.
Q They're not. So he pulls them, each one of them, as individually.
A Yes, sir.
Q. And then he goes and he sits down with the customer.
A. Yes, sir
Q And according to your testimony, he shows it to them individually, and he points and does not use flags
A. Yes, sir

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Q. And you don't know what he says or what explanations he makes.
A. No, sir.
Q But you gave me the one that you would make and what you would expect to be the minimum.
A. Yes, sir
Q. So if I ask you about the agreement, who made the decision to do something like the class-action waiver, you wouldn't know anything about that, would you?
A. No, sir
Q. You don't even know what a class-action waiver is.
A Yes, sir.
Q. What is it?
A You agree not to file a class-action lawsuit.
Q Well, do you think that's to the customer's advantage? You said you thought this was to his advantage Is that – is that one to the advantage of the customer?
A. I really don't know, sir.
Q Well, isn't it to the advantage of you?
A. No, sir.
Q it's not to the advantage of the company?

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A. I wouldn't think so.
Q. Well, why is it in there?
A I have no idea
Q Have you talked to anybody about Exhibit Number 2?
A. No, sir
Q I take it that it's a form contract, the arbitration. I mean, it's a form document.
A Yes, sir.
Q And you all drafted the form, right?
A. Sonic Automotive drafted the form.
Q Oh, the high-ups sent it down to you and said, use this
A Yes, sir
Q Do you know anything about the negotiations for buying this particular deal or going through with this deal?
A. No, sir.
Q. Do you know how it happened?
A. No, sir.
Q. Do you know if it was – if there was any telephone conversations or it was all in store, how many visits there were; do you know anything about it?
A No, sir

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Q. If I show you this, would you know this was the packet for this deal?
A Yes, sir.
MR LEWIS. Would you mark it? That's pretty good.
(Plaintiff's Exhibit Number 3, Dealership transaction documents, was marked for identification.)
BY MR. LEWIS:
Q. So if I look at Exhibit Number 3, that's the packet for this deal, which was a sale of the car, that would be the same packet that any sale would have
MR. BLACK: Object to the form. You can answer
A. Yes, sir.
BY MR. LEWIS:
Q. Turn to the last page there. It has the number on it of 04039. Do you see that down at the -- at the --
A. Oh, yes, sir
Q. I want to make sure we're looking at -- we were looking at Exhibit Number 3.
MR HAMM: Mr Lewis, repeat the number you just referenced.

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MR. LEWIS: 4039
MR. BLACK: It appears they added a number to the document in addition to our number Page CBM-0000045.
MR. HAMM Okay Thank you
BY MR. LEWIS:
Q You see that packet?
A. Yes, sir.
Q Just out of curiosity, turn to the front page Did Brad Martin sign that front page?
A No, sir
Q. Huh?
A No, sir.
Q. And did -- did Brad Martin agree to pay the document fee?
MR BLACK: Object to the form of the question. I'll instruct him not to answer That goes beyond the --
MR. LEWIS Not to answer Okay That's fine
BY MR LEWIS.
Q. Did -- did -- he didn't sign that. Is there any other places he didn't sign?
A When you're referring to Brad Martin, are -- we're talking about the Watts, correct?

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Because I don't have the Martin deal in front of me. I can't --
Q. You said Mr Martin didn't sign an arbitration agreement. You told me that.
A. Yes, sir
Q. And I'm asking did he sign the front page, the privacy notice, the front page, did he sign that page of his packet?
A. I can't tell you that. I'm sorry. I misunderstood. I cannot tell you.
Q You remember the arbitration, but you don't remember this.
A. Yes, sir
Q. But we could pull his packet and find out what he did, right?
A Yes, sir
Q Okay. Because you have his packet somewhere.
A. Yes, sir.
Q. What does it say on arbitration -- the arbitration agreement in his packet, or is it just blank? You don't know.
A. (Witness shakes head.)
Q Is that right?
A. I don't know.

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Q. All right. Let's look at that last page. It's got the All Cars Checklist. Right?
A Yes, sir
Q. And down there it says, Arbitration Agreement.
A. Yes, sir
Q That's on every deal.
A. Yes, sir.
Q. And it's a check Either you check it or you don't, right?
A Yes, sir
Q Is this just a reminder to Mr. James, or where does this -- this document go after it's completed?
A. This -- this document here is something we haven't used in a while. This is a checklist for the F and I manager, Corey James, to make sure that he's got everything in this package so it will go upstairs to the accounting department
Q Okay Where -- so this form, this one, 04039, isn't used anymore.
A. Not this version, no, sir
Q Is there another version?
A On the back of the deal jacket.
Q On the back of the deal jacket.

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A. Yes, sir.
Q. Well, that explains a lot to me. What is a deal jacket?
A. That's where all these documents would be placed.
Q. Does that just mean a folder?
A. Yes, sir. It's a pre- –
Q. It's – huh?
A. It's a pre-printed folder with this checklist and some other checklists.
Q. On the – on the back of it.
A. Yes, sir.
Q So when you put all this in the folder, they want to make sure they have all this in it.
A. Yes, sir
Q. And then this folder is kept in your dealership.
A. Yes, sir.
Q. Is this checklist sent anywhere or it just sits there in – on the folder?
A. In the folder.
Q. In the folder?
A. Yes, sir.
Q. It's not sent anywhere?
A. No, sir.

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Q. Well, who reviews to see if the checklist is in there and properly done?
A. Corey would. Corey James.
Q. Corey James would look at it?
A. Yes, sir.
Q. Well, he's the one that did it.
A. Yes, sir.
Q. So he'd look at the checklist that he did to see that everything in the checklist was done.
A. Yes, sir.
Q. Does anybody else look at it?
A Accounting probably.
Q. Probably accounting. So this – this – what do you call it, the deal folder would be sent to accounting?
A. Yes, sir.
Q. And they check it over, too, to see that all these things are in here.
A Yes, sir.
Q. Now, what – what are they instructed to do if the – with Mr Martin when he didn't sign the arbitration agreement? What do they do then?
A. Nothing
Q Nothing?
A. Nothing.

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Q. They just look?
A. Yes, sir.
Q. So this checklist, they just say, huh-uh, not signed.
A. It wouldn't state not signed.
Q. Well, it's blank.
A. Blank.
Q. And then they – they wouldn't do anything.
A. No, sir
Q. You don't know anything about how the arbitration agreement was presented to the Watts, other than you – you say that Mr. James said it was each piece of paper was given to them, and he pointed to where to sign; that's all you know about the presentation of the arbitration agreement.
A That is correct.
Q. You don't know anything that was said, anything else but that.
A No, sir.
Q And you're the man most knowledgeable. Do you have a record of how many arbitrations that you have – you have gone through with reference to the arbitration agreement?
A I'm sorry. I didn't understand.
Q. You have an arbitration agreement there.

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A Yes, sir
Q. It requires arbitration, you say.
A. Yes, sir.
Q Has anybody ever arbitrated with you?
A. I have one now
Q. One. Is that the only one you can remember?
A. That's the only one that I've ever heard of.
Q. Well, how long have you been with this company?
A. 32 years.
Q. That's pretty good. So in 32 years, you haven't ever heard of another one except the one you have now
A. Right.
Q What's the one you have now?
A I can't remember the guy's name It's Turner
Q What's he mad about?
A. A paint defect on his car
Q What kind of car was it?
A. It's a BMW
Q. BMW Did Mr. James leave on his own, or was he fired, or do you know?

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MR. BLACK: Object. Leave from where?
MR. LEWIS: He left from –
MR. BLACK: From Century BMW?
MR LEWIS. He was up in – he just told me.
MR. BLACK: In Charlotte? Okay.
BY MR. LEWIS:
Q. Charlotte.
A. Mr. James left on a mutual agreement. Corey's family was living in Charlotte. He was having to live in Greenville, and he needed to go back to Charlotte to his family.
MR BLACK: That's why – he's asking – he's answering why he left Century BMW.
MR. LEWIS. I understand that. I'm not too bad. I can listen
BY MR. LEWIS:
Q. All right. Do you know why he left Sonic in Charlotte?
A. No, sir.
Q. You don't know if he was fired or he left on his own?
A No, sir
Q. All you know is he wanted to leave your company to go back to Charlotte because that's where

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his family was.
A. Yes, sir
Q. Well, did he come from Charlotte?
A. Yes, sir.
Q. Did he come from Sonic of Charlotte?
MR BLACK. Object to the form.
A. I really don't remember where Corey – what his other job was before us. I really don't remember
BY MR. LEWIS:
Q. This claim you have in arbitration, what – where is it in the process?
A. It's just in beginning stages.
Q. Someone just said they want – they want to make a claim?
A. Yes, sir
Q. Did they sue you first, or did they just go into arbitration?
A They sued us, and then it went into arbitration.
Q. Who was the – who is the lawyers involved; do you know?
A. Brad Martin
Q Brad Martin again, huh? He's the lawyer for you, or he's suing you?

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A No, he's the lawyer for us
Q. And who is the other guy?
A. I really don't remember his name, sir.
Q. And it's up here in Greenville?
A. Yes, sir
Q. And it's over a BMW
A. Yes, sir.
Q. Have you told anybody else about this claim, this arbitration claim, other than me here today?
A. I'm sure quite a few of my employees know about it.
Q. Well, how about people out – all your – any customers or anything?
A. No, sir.
Q. You don't tell that?
A. No, sir.
Q. You're frowning Why are you frowning?
A. That wouldn't be a good business practice
Q. Wouldn't be a good business – okay And you don't know how you choose an arbitrator under your arbitration agreement.
A. No, sir.
Q. You don't know anything about that.
A. I understand there's a board or a – a

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panel that you call, and they assign them or whatever. But that's to the – my extent of the understanding
MR. BLACK: Cam, are you getting to a point where we can take a break soon?
MR. LEWIS: Sure, we can take a break now
MR. BLACK: Okay.
(A recess transpired.)
BY MR. LEWIS:
Q You've been with this company, I think you said 32 years.
A Yes, sir.
Q. And that company is what – which company?
A. Century BMW
Q. All right. How – did Sonic always own Century BMW?
A. No, sir
Q. When did they buy them out?
A 1998.
Q Okay. Now, how long have arbitration agreements been – been used?
A. I became general manager in 2002, and they were in effect then.
Q How about before that?
A. I can't answer to that, sir

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Q. What were you before?
A. I was parts and service director.
Q. So as parts and service director, you didn't ever know what was in the packet?
A. No, sir
Q And in the – you being appointed as the man most knowledgeable about the arbitration agreement, you never looked back in the history to see when it became any arbitration?
A. No, sir
Q. Now, when did Mr. James leave you, that is, Century BMW?
A. To the best of my recollection, it was early 2006.
Q. Now, you said he left on mutual terms or something like that.
A. Mutual agreement.
Q. What does that mean?
A. I decided and he decided that this wasn't the place for him to be at this time.
Q. Okay. Would it be fair to say you weren't happy with his work?
A. I was happy with his work.
Q. Well, then why – why wasn't it good for him to be here?

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A. He was continuously late, but his work was very good.
Q. Okay. Now we got it So he was late, but a good worker after he was late.
A. Yes, sir.
Q. Now, late, that means he just didn't come in five minutes, that would be real late.
A. No, sir. Five minutes, in my book, is late.
Q. Well, you're one of these people.
A. Yes, sir
Q. You want them on time.
A. Yes, sir.
Q. So how – how late would he be?
A. Five to ten minutes
Q. And he would be five to ten minutes late over – and how often?
A. At the end of his employment, it became more regular. Maybe twice a week, three times a week.
Q. And that just irritated you.
A. Yes, sir.
Q. And he was the – is it finance and income or is it finance and insurance, F and I?
A. I've always called it finance and income.

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Q. You have?
A. Yes, sir.
Q And you don't know whether it's finance and income or finance and insurance?
A. I've always called it finance and income.
Q. Okay. Fine. And so with him coming in five, ten minutes late two times, three times a week, you decided maybe it would be better if he would go somewhere else?
A. He needed to go home.
Q He needed to go home. And you made that decision he needed to go home?
A. And he agreed.
Q. Okay. And did you get him a job then up there at Sonic?
A. No, sir.
Q. Where did he go when he went to Charlotte?
A He went to Sonic when he went to Charlotte, but I did not get him the job.
Q You didn't get him the job?
A. No, sir.
Q. Well, how did he get a job back at Sonic when he left Sonic?
MR. BLACK: Object to the form.
A. I could only guess to that.

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BY MR. LEWIS:
Q. Well, guess at it.
MR BLACK: Object to having the witness guess.
A. Networking.
BY MR. LEWIS:
Q. Networking.
A. Yes, sir.
Q. What was his job in Charlotte?
A. Previously?
Q. No, when he left you.
A F and I. He took the same job in Charlotte that he left me.
Q. And went to another dealership?
A. Yes, sir.
Q What was the dealership?
A. Arnold Palmer Cadillac.
Q. Arnold Palmer Cadillac. And that's a Sonic dealership?
A Yes, sir.
Q. And he was doing the same thing?
A. Yes, sir
Q. Was he the only one in that dealership like he was in this dealership?
A I don't know if he was the only one in that

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store or not.
Q Okay. Do you have a new guy?
A Yes, sir
Q. What's his name?
A. Rodney McCauly.
Q. And where is he from?
A. He is from the Greenville area.
Q. So he just – did he come out of a Sonic store, or did he –
A. No, sir
Q. You just went and found him?
A. I just went and found him.
Q Did you know him?
A No, I didn't personally.
Q. Who did?
A His former employer recommended him.
Q Who was that?
A. James Brockman.
Q. And what – what's he?
A. He's a car dealer.
Q And what dealer is that?
A. Kia
Q The – we talked about that class-action waiver in that agreement, Exhibit Number 2. Do you remember that?

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A. Yes, sir
Q. Do you know when it was put in or –
A No, sir
Q. You just know that it's in there now?
A I know that it's in there now.
Q. And you couldn't tell me if it was in there – and we know it was in there when – 6/25/05
A. Yes, sir.
Q. And it's been in there ever since.
A Yes, sir
Q. But we don't know how long before 6/25/05 it was put in.
A No, sir
Q As a general manager, you don't – do they – how many of those stacks of these – each of these pieces of paper in the packet, Exhibit Number 3, how many do they send you at a time, or do you run them off a Xerox?
MR. BLACK. Object to the form
A. We order them. The exact quantity, I have no idea, in each package
BY MR LEWIS:
Q. So you order them.
A Yes, sir

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Q. And how do you order them? Do you order them by some – is there like – you know, sometimes they say this is Form Number 666. Is there – at the bottom, do you see – looking at Exhibit Number 3, do you see that?
A. Yes, sir.
Q. Do you see the long one, the first long one that comes out? It's called the Full Disclosure Customer Worksheet. Do you see that? It's the first one.
A. Yes, sir.
Q. And down at the bottom, it has a Form 814WS
A. Yes, sir.
Q. You know what, if anything, that means?
A That's the Austin Business Forms form number for this.
Q. Who is Austin Business Forms?
A. That's the supplier of this form.
Q. And so who makes – they just – they print them up?
A. Yes, sir.
Q. Where is this Austin Business Form place?
A. I have no idea.
Q. How do you know about it?

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A. It's one of our recommended vendors.
Q. So how do they know – is this a worksheet that – that Sonic tells you to use?
A. Yes, sir.
Q. And Sonic says that they got this form we want you to use.
A. Yes, sir.
Q. And you buy it from them.
A. Yes, sir.
Q. I notice on the Arbitration Agreement, I don't see any form numbers.
MR BLACK. Is there a question?
BY MR. LEWIS.
Q. Do you see that?
A. Yes, sir.
Q. Well, how do you order it?
A. It's probably – well, I can't attest to that, what I – how you order it. I don't order the supplies.
Q. Well, it doesn't have a form number. How do you know what to ask for?
A. Probably by title.
Q. Now by title. So you order by title.
A. If it doesn't have a form – a form number, you would order it by title.

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Q. And where do you order the Arbitration Agreements from?
A. All of our ordering is done online through Sonic.
Q. Through Sonic?
A. Yes, sir.
Q. Is there something you bring up? What kind of screen do you bring up; what's it called?
MR. BLACK: Object to the form.
BY MR LEWIS:
Q. Form order?
A. The exact system name is PECOS. P-E-C-O-S.
Q. And when you bring up PECOS, what does it tell you?
A It gives you the list of forms
Q. Oh, and you just can order like that.
A. Yes, sir.
Q And the -- the form list, you see -- let's go back to that last page again on Exhibit Number 3 Are the All Cars Checklist, are those all forms?
A. You're talking about each individual --
Q. Yeah.
A. -- area? Some of theme are forms. Some of them are information
Q. Okay Well, let's look at the packet then.

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Look at the packet Start with the first number, and that's 3995. Do you see that?
A Yes, sir.
Q. Is that a form?
A. Yes, sir.
Q And do you order that?
A Yes, sir
Q. Is that a required form by law, or just a required form by Sonic?
MR BLACK: Object to the form. You can answer if you know.
A. This is a privacy notice. It is required by Sonic and probably required by law
BY MR LEWIS
Q. All right
A. It is required by law
Q And the next one is -- is this a form that you order?
A. No, sir. This is automatically printed out at the time the purchase is made, depending on what coverage the customer decides to or not to take
Q. And that's 3996
A Yes, sir
Q All right. Let's look at 3997 Is that a form?

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A. Yes, sir.
Q. Is that a form that's required by law?
A. Yes, sir.
Q And you order those from that same place?
A. Yes, sir.
Q. Okay. Look at 3998. That's not a form, is it?
A. I have no idea what that is. A fax confirmation
Q. Okay Look at 3999. That's -- is that a form?
A. Yes, sir
Q. Is that one you order from the same place?
A. This one may not be. This one may be from the State of South Carolina.
Q Okay. Is it a required form?
A. Yes, sir.
Q By law?
A. Yes, sir
Q. The next one is a vehicle history report, 4000
A. This is computer-generated from BMW
Q. Okay. How about 4001, is that part of the same report, or no?
A. This is -- this is where we shipped a lien

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off to someone.
Q. Okay. But that's not --
A. That's not a form, no.
Q Okay. How about 4002?
A. This is a form
Q. Is this a -- required by law?
A. This is an agreement to provide insurance.
Q An agreement with who?
A. The customer and their insurance company
Q. Okay Do you -- is that something that you require?
A. We do require it.
Q. But is it -- so this is a form of Sonic, not a -- a form by law
MR. BLACK. Object to the form
A. This is a form by Sonic.
BY MR LEWIS
Q. Okay And you order it?
A. Yes, sir.
Q All right. How about 4003?
A. This is a computer-generated.
Q. At your dealership?
A. Yes, sir. This is built into our computer system, so this is the way it prints
Q. All Sonic dealerships have the same

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computer system?
A. Yes, sir, now we do.
Q. What is it called?
A. ADP.
Q. ADP. And 4004 would be another ADP-generated?
A. Yeah, the next three forms are the same form.
Q. Okay How about – how about now we're looking at 4007. We already talked about it.
A. Yes, sir.
Q. Now, is this form, when it comes, this full disclosure customer worksheet, is it long like this, or is it the same size of those other papers?
A. This form was long in 2005, and they changed it between 2005 and 2008. It's shorter now.
Q. It fits in to be like the other ones.
A. Yes, sir.
Q But it was long back then.
A. Yes, sir.
Q. Now, the next one is 4008, which is Exhibit Number, I believe, 2, as well as part of the packet.
A. Yes, sir.
Q. And it's long
A. Yes, sir.

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Q. Was it long at that time, or was it –
A. Yes, sir.
Q. – short?
A. Yes, sir.
Q. It was long.
A Long.
MR. BLACK: And by long, you mean on legal-size paper?
BY MR. LEWIS.
Q Is this – looking at it, is this the size of the document, the original document?
A. Yes, sir
Q. Do you know how many words are in this document?
A. No, sir.
Q. Would you believe me there was 1100?
A. Yes, sir.
Q And the next one, 4009, is a –
A. Ordered form
Q. A what?
A. Ordered form.
Q. Ordered. And it's – but it's not required by law?
A. Car invoice may be required by law; I'm not sure of that.

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Q. Okay Car invoice. Now, this one here, looking at 4009, this is a car invoice to who? Who is it an invoice to?
A. This one's an invoice to the Watts.
Q And what does it tell you, that this is what they paid, 32,000?
A. Yes, sir. Yes, sir.
Q. And the 32,000 is made up of 31,375, plus 299 50, plus 300, plus 25?
A. If that adds up to 32,000, yes, sir.
Q. Well, okay What is total time price?
A. Oh, that would be if you financed it.
Q If I financed it, it would be less?
A. It would be more, because of two lines above you would add your finance charge in.
Q. I'm con- – I'm very confused. It has in here, number – total time price What is that?
31,700.50.
A. I don't – what's that, 31 –
MR. BLACK: Let me just object that I think we've strayed beyond the topic in the Notice.
MR. LEWIS: Okay.
MR. BLACK: I'm giving you some leeway. The witness wasn't – didn't come in prepared to analyze each of these forms in detail.

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BY MR LEWIS:
Q. Okay So you don't know what that is today.
A. Without a calculator and sitting down and figuring it out, probably not.
Q Okay
A. But I just don't know right this moment.
Q. Okay 4010, is that – what is that?
A. It's an ordered form.
Q. And ordered, we mean ordered from Sonic?
A. Yes, sir
Q And is it required by law?
A. No, sir
Q. The same as 4011?
A. Yes, sir
Q And 4012 is something that was generated on your computer?
A. Yes, sir
Q. And 4013, I don't know what that is That must be something that's stamped on the back of something It doesn't matter
A. I have no clue.
Q And then you have pictures with people on them and an insurance card.
A Yes, sir.

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Q. And then you have another picture of a pretty lady. Do you see that of one?
A. Yes, sir
Q. All right. That's 4015.
A. I saw that.
Q. 4016, that must come off of a computer?
A. Yes, sir.
Q. 4017, what is that?
A. This is computer-generated, to do the tag work for the car.
Q. Okay. And 4018 is a –
A. A copy of a check.
Q. Okay. 4019, that's – is that a form?
A. Yes, sir, that's an ordered form.
Q. Okay. And it's not required by law?
MR. BLACK: Object to the form.
A. The Retail Buyer's Order is required by law.
BY MR. LEWIS:
Q. Okay. Required by law. Now, if I – and is this form ordered?
A. Yes, sir. Yes, sir
Q. And everything that's not written on it would – that is – that is, it looks typed, that would be on the ordered form?

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A. Yes, sir.
Q. So every ordered form on BM – from Sonic will have the processing fee there?
MR. BLACK: Objection. And I'll instruct you not to answer. That goes well beyond the Deposition Notice to the merits of the case.
MR LEWIS. You shouldn't have given me the form.
BY MR LEWIS
Q. The next one, 4020?
A This is sent to us by BMW
Q. Is it required by law?
MR. BLACK. Object to the form Go ahead.
A. I have no idea.
BY MR LEWIS
Q. How about 4021?
A. Continuation
Q All right. And then the certificate of title, we know what that is, 4022 4023 is a what?
A The back of the title
Q. Okay. 4024, what is that?
A. That is a Form 400 This comes from the State of South Carolina.
Q Is that required –
A. Yes, sir

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Q. – by law?
A. Yes, sir. It's required.
Q. And is 4025 required by the law?
A. Yes, sir. That's the back of Form 400.
Q. Okay. 4026 is an internal form?
A. Yes, sir.
Q. And is this check requested, is that something that comes from Sonic, or is that just y'all's form?
A. This form comes – all our forms that are pre-printed come from Sonic.
Q So this one comes from Sonic, too.
A. Right, yes.
Q. But it's not required by law?
A. No, sir.
Q. Same with 4027?
A Yes, sir.
Q 4028?
A. This is a BMW computer printout.
Q. Okay. 4029?
A. Same.
Q. 4030?
A. Yes, sir. Same thing.
Q. 4031?
A. Same thing.

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Q. Now, that's required by law, isn't it?
A. The odometer statement?
Q. Yeah.
A. This one is sent to BMW.
Q. But there is an odometer statement –
A. Yes, sir.
Q – required by law?
A. Yes, sir, there is
Q But this is not it?
A. No, sir.
Q. Okay. 4032.
A. That's a pre-printed form from Sonic
Q. Is that required by law?
A. No, sir
Q And 4033?
A. Computer-generated, in-house form.
Q. 4034?
A. Computer-generated, in-house.
Q. 4035?
A The same.
Q 40 – I don't see it. It's cut off. It's CBM-0000042
A. Right. This is a computer-generated, a copy of the one we just went over that was handwritten.

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Q. Oh, that is a copy of that one he wouldn't let me ask you about.
A. Yes, sir.
Q. And this is -- the next one is 4037. Those are government forms?
A. These are county tax papers.
Q. And 4038?
A. That's a copy of a fax.
Q. And 4039 is that checklist we've already gone over
A. Yes, sir.
Q. And this is essentially what a packet would look like for anybody that bought a car
A. Yes, sir.
MR. BLACK: Object to the form of the question.
BY MR. LEWIS:
Q. Now, if you had a -- if you were going to finance the car through you, would there be a finance packet, too, or would this packet, Exhibit Number 3, be bigger?
A. Exhibit 3 would be bigger.
Q. Was it -- and if you were going to lease a car, there would be just different documents that would support a lease, but it would be essentially

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the same documents otherwise?
A. Yes, sir.
Q. Do you know -- we went through each of the documents in Exhibit Number 3. Do you know what the purchasers in this case were told about each of those documents?
A No, sir
Q. Do you -- what is the requirement you have on your F and I guy to explain each of the documents; does he have a requirement?
A. Yes, sir
Q. And he's supposed to explain each one of them?
A. Yes, sir
Q And how long -- how long does that take?
A. Oh, it could take, depending if the customer had any questions on each one, it could take five, ten minutes a form --
Q Is that what --
A. -- if they had questions.
Q Well, what does it take normally? You've been in the business. Y'all sell 1200 cars a year How long does it take to explain this packet? One guy, 1200 people
MR BLACK: Object to the form The packet

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contains a lot of documents that don't go to the customer.
MR LEWIS: Okay
BY MR. LEWIS:
Q. Pick up Exhibit Number 3. And I want you to look through it and tell me each document that the customer is explained.
A. The privacy notice, the first one.
Q. All right.
A. The second one, which is the --
Q. Give me the numbers of them at the bottom
A. Okay. Okay. The first one is 3995.
Q Uh-huh.
A. 3996
Q. Uh-huh
A. 3997 is explained on the sales floor This is a --
Q Sales floor?
A. Yes, this is a document that's actually posted in the window of the car.
Q. So that document is for the salesman to explain.
A. It's -- yes, sir.
Q. But the F and I guy doesn't say anything about it?

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A. He will go over it again.
Q He will go over it again.
A. I'm going to skip 3998, because -- 3999 would be reviewed in the F and I office.
Q Reviewed. Do they explain it to them or do they just review it? Do they have a requirement to explain it?
A. Well, yes, they would explain it. There's nothing but the sale-of-a-motor-vehicle form
Q Okay
A. 4002 would be explained and ask the customer for information specifically on this form
Q. Okay
A. Skipping ahead, 4008.
Q Yeah. We've already talked about that one
A. 4010.
Q Uh-huh.
A. The printed version of 4019, the one we couldn't find the number on
Q. 4019?
MR BLACK. I think the printed version was --
MR LEWIS Okay
MR BLACK. The printed version is CBM --
BY MR LEWIS:

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Q. 4019 is gone through.
A. Yes, sir.
MR BLACK: Well, he said the printed version.
A. The printed version
BY MR. LEWIS:
Q. Yeah Yeah. I don't understand the printed version. 4019 is printed.
A. The computer printed one, the one we could not find the -- the number on at the end.
MR. BLACK. It's CBM-000042. It's the one that your number got knocked off the bottom of.
MR. LEWIS: 40 what --
MR. BLACK: Four 0's, and then 42.
MR. LEWIS: 42
BY MR. LEWIS:
Q. Okay It's got them all typed.
A. Yes, sir.
Q. What do they do -- both of them are signed Why do they go through one and then type one?
A. The -- the handwritten one is generated out on the sales floor with the sales manager.
Q Oh, the sales manager
A. Yes, sir
Q. And so there's a new person that's been

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involved here. We had -- I thought it went direct from Mrs Elizabeth to Mr. James. It doesn't? There's somebody in between?
A. The salesperson will confer with the sales manager to get his signature, approval to sell the car.
Q. So the -- I got -- I got to understand something. So this Exhibit Number -- Exhibit Number -- hold on -- 3, 4019 --
A. Yes, sir.
Q. -- that's done on the floor.
A. Yes, sir.
Q. Now, is the sales manager's signature on that document?
A. Yes, sir.
Q. And so they sit down there, and this is negotiated, and then the sales manager signs it.
A. Right.
Q Okay. And then where does it go?
A. Then the salesperson takes it to Corey James at that time
Q. And Corey James then types up Exhibit Number -- the one that doesn't have that cut off.
A. That is correct.
Q. CBM-000042.

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A. Yes, sir.
Q. And should be exactly the same, except one's typed and one isn't.
A. Yes, sir.
Q Well, why do you do that?
MR. BLACK: Object to the form
A. Why do you do the first one, the handwritten one?
BY MR. LEWIS:
Q. No, why do you take one and get it all filled in in handwriting, and then take the time to type it -- type it and get it on a different -- the same form typed?
A. To make sure there's no mistakes.
Q To make sure there's no mistakes?
A Yes, sir
Q There's more likely to be a mistake if you go from a handwritten one to a typed one
MR BLACK. Object to the form.
A These two have to match
BY MR LEWIS:
Q. Oh, they have to match. I gotcha And who determines they match?
A. The account -- I mean, the F and I office, Corey James.

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Q. Now, who is -- the bottom signature, who is that?
MR. BLACK: There are a number of signatures. Which are you asking him about?
BY MR. LEWIS:
Q. On 000042. Mine is cut off a little bit. What's the bottom signature; is that Corey James?
A. Are you talking about where it says, this agreement, the very last --
Q. Yeah.
A. That would -- it's cut off, but it looks like Corey.
Q. Okay. And then it says, disclaimer of warranties, purchaser's signature. The purchaser's signature is not there, right? Am I right?
A. You're talking on new vehicle disclaimer warranties?
Q Yeah.
A They didn't buy a new vehicle
Q. So you have to sign either one of those?
A Yes, sir
Q. Okay And Corey James is the officer of the company that signed this
A. Yes, sir.
Q. And he is also the -- is that his signature

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on the 4019? Whose signature is that?
A. I haven't seen this signature in a long time, but I would assume it's Jeff Novak.
Q. And what is he?
A. He was the used car manager
Q So the used car manager agreed to it, and Corey James agreed to it on a different form
A. Yes, sir
Q. Once they – the used car manager agreed to it, it's over with then, isn't it? Does Corey James have the right then to not do it?
MR. BLACK: Object to the form
A Corey does not have the right to stop the deal.
BY MR. LEWIS:
Q. So why – so he approved it, but he doesn't have the right to not approve it?
A. He would not sign it if it did not match up.
Q. But all he would be able to do is match it up, because once it's signed, as shown on 4019, then you have to sell the car.
MR. BLACK. Object to the form.
A. Sold – 4019, we agreed to sell the car for this amount.

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BY MR LEWIS
Q Right. And that's it.
A. The manager
Q Right.
A Corey would have the right, if there was something that did not add up correctly, to go back to Jeff and say, there's something wrong here, I'm not going to sign it until you get it straightened out.
Q. And Jeff would have to go straighten it out.
A Yes, sir.
Q And that could even mean having – making them pay more money?
MR BLACK Object to the form.
A. Not above what they originally agreed to
BY MR. LEWIS
Q Okay Now, this arbitration agreement says – has some provision in there about small claims court. Do you understand that, or do you know anything about that?
A. I don't know anything about the small claims court
Q. You what?
A. I don't know anything about the small

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claims court part of it.
Q. Does – do you know if that's something they explain to people, or do you know? You don't know?
A. I don't know.
Q Okay. We've got the packet that we showed before you, Exhibit Number 3. Okay Our client said there were more documents than this, than shown, some other documents than shown in this packet. Do you know what they could have been?
MR. BLACK. Objection Mischaracterizes the testimony
BY MR. LEWIS
Q. Well, could there have been more documents given to the Watts than are in this packet?
MR. BLACK: Okay. Form, speculation.
A. I mean, other than owner's manuals?
BY MR LEWIS.
Q. Yeah.
A. There could be owner's manuals.
Q. Anything else?
A There should be other – no more legal documents, no.
Q. You know anything about what's been called the Dealer Act, the act that allows people to bring

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suits against dealers for not doing – for fraud and so forth?
A. No, sir
Q. Have you ever read anything on it?
A. No, sir.
Q. Now, I want to ask you one more little set of questions. And what I want to know is you mentioned to me that there may be a training or – and the training might lead us to what is taught to F and I people. Where would we go to find that?
MR. BLACK: Object to the form.
A. To find the training schedule?
BY MR. LEWIS:
Q. To find out what – how they train people. What is –
A. Richard O'Connor.
Q. And he would have the training?
A. Yes, sir.
Q And he's up in the offices in –
A. Charlotte
Q – Charlotte And what – and it's called Sonic, the Sonic offices?
A. It's Sonic Automotive.
Q Okay In Charlotte?
A. Yes, sir.

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MR LEWIS: Excuse me just a minute.
MR. BLACK: Break?
MR. LEWIS: I hope that we can leave you
(A recess transpired.)
MR. LEWIS. Thank you, Mr. Bishop.
THE WITNESS: Thank you
EXAMINATION
BY MR. BLACK:
Q. Mr. Bishop, my name is Dennis Black. I'm from the law firm called Williams and Connolly. You understand I represent Century BMW?
A Yes, sir.
Q. Mr Lewis asked you a bunch of questions about what he termed "the packet" this morning, and I think it's marked in front of you as Exhibit 3 Do you recall those questions?
A Yes, sir
Q. Are there a number of documents in what he called the packet that are not shown to the customer at the time of the deal?
A There's quite a few in there that wouldn't be shown to the customer.
Q. So what's -- what you've got in front of you as Exhibit 3 is not a stack of documents all of which are given to the customer in the F and I

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office.
A. That's correct.
Q. Let's go through and give some examples of that. Would the -- and you skipped over -- when you were asked about documents that were explained to the customer, you skipped over a number of documents in the deal jacket, right?
A. Correct. Those would be documents the customer wouldn't see.
Q. Okay. Let's look at CBM -- well, let me use his numbers since he did. If you turn to Document Number 4000, the vehicle history report
A. That wouldn't be to the customer.
Q. And 4001, where you were paying off the lien on the trade-in?
A. That wouldn't be to the customer
Q. If you go to the 4003.
A No
Q And by no, you mean that doesn't go to the customer?
A. Would not go to the customer
Q. 4004?
A It's a copy of 4003, and 4005 and 4006 is all copies of the same document They would not go to the customer

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Q. How about 4009?
A. 4009 would go to the customer
Q. 4012?
A. Would not.
Q. 4013?
A. Would not.
Q. 4014 came from the customer?
A. Yes, sir
Q. Same for 4015?
A. Yes, sir.
Q How about 4016?
A. That would not go to the customer
Q. 4017?
A. Would not.
Q 4018?
A. No, sir
Q 4020?
A. No, sir.
Q 21?
A No, sir.
Q. How about 22, does that go to the customer, 4022?
A. Yes. They paid cash for it; they would get this title.
Q. Okay 4026?

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A. No, sir
Q 4027?
A. Would not go
Q. 4028?
A. Would not go.
Q. 4029?
A. No
Q. 4030?
A. No.
Q. 4031?
A. No, sir
Q. 4032?
A. No, sir.
Q. 4033?
A No, sir
Q. 4034?
A No, sir
Q. 4035?
A No, sir
Q. 4038 is a fax from the customer sometime after the transaction?
A. Yes, sir.
Q So that wouldn't have been explained to the customer during the transaction.
A. No, sir

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Q And the checklist at 4039, that doesn't go to the customer, does it?
A. No, sir
Q. Did Century BMW have an official policy of whether you would sell a vehicle to a customer who refused to sign the arbitration agreement?
MR. LEWIS Object to the form.
A. If a customer objected to signing the arbitration form, we would still sell them the car.
BY MR. BLACK.
Q You -- you testified that you -- that the F and I managers were not trained to volunteer to the customer that you don't have to sign this arbitration agreement. Do you recall that?
A. Correct. The F and I manager was not obligated to explain that they did not have to sign the arbitration agreement.
Q. Were they trained to tell the customer, you are required to sign this arbitration agreement?
A. No, sir.
Q. If the customer asked, am I required to sign this arbitration agreement as a condition of buying the car, what was Century BMW's policy for --
MR. LEWIS: I object to the form.
A The customer --

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BY MR BLACK:
Q. Let me ask the question. What was Century BMW's policy about whether they would sell a car to someone who objected to signing the arbitration agreement?
A. We would still sell the car.
Q. You testified that you could only remember the name of one person who had refused to sign the arbitration agreement and, nevertheless, bought a car Are you aware that there are other customers whose names you don't remember who similarly refused to sign the arbitration agreement and you, nevertheless, sold them the car?
A Yes
MR LEWIS. Object to the form
BY MR. BLACK:
Q And are there other customers other than the one person whose name you remembered who refused to sign the arbitration agreement and --
MR LEWIS. Object to the form
BY MR BLACK:
Q Let me finish my question Are there people other than the person whose name you mentioned that you are aware of who refused to sign the arbitration agreement and, nevertheless, were

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sold a car by Century BMW?
MR. LEWIS: Object to the form.
BY MR. BLACK.
Q. You can answer.
A. Yes, sir.
Q. You mentioned earlier that you're only aware of one arbitration that's been filed since you've been general manager?
A. Yes, sir.
Q. How many lawsuits are you aware of that have been filed against Century BMW since you've been general manager?
A Actually, there was two.
Q. And does that include this one?
A. Yes, sir.
Q. So this one and one other.
A. Yes, sir
Q. And was the one other the one that went to arbitration?
A. The other one, I cannot recall. I did not go to court. I believe it was dismissed between the two lawyers.
Q Okay. So there's the Turner case that went to arbitration. There's the one other one.
A. Right.

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Q. And then there's this lawsuit.
A. Yes.
Q. And that's the only litigation you're aware of?
A. That's the only litigation I've been involved in since 2002. And before that, I was not involved in any.
MR. BLACK. Nothing further
EXAMINATION
BY MR. LEWIS:
Q. You mentioned you remember some other customers that you couldn't remember on the arbitration agreement?
A. I remember other cus- -- customers not signing I do not remember their names.
Q Do you remember whether it was one, two, three, four?
A. Exact number, I couldn't tell you, sir
Q. You couldn't tell me anything about it. You just remembered somewhere --
A. Yes, sir.
Q. -- just in your head somewhere.
A Yes, sir.
MR. LEWIS: Nothing further.
(The deposition was concluded at 11 58 p.m.)

SIGNATURE OF DEPONENT

I, the undersigned, JOHN ROBERT BISHOP, hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any:

PAGE	LINE	CHANGE	REASON

_____

JOHN ROBERT BISHOP DATE

CERTIFICATE OF REPORTER

I, Kathy P. Taylor, Registered Professional Reporter and Notary Public for the State of South Carolina at large, do hereby certify that the foregoing transcript is a true, accurate and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof

WITNESS MY HAND, I have hereunto affixed my official seal this 1st day of February, 2008, at Greenville County, South Carolina

_____

KATHY P TAYLOR
REGISTERED PROFESSIONAL REPORTER
MY COMMISSION EXPIRES
JUNE 13, 2017

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STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF AIKEN
HERRON, et al.,

Plaintiffs,

Case No.
2006-CP-02-1230

vs.

DICK DYER & ASSOCIATES, INC., et al,

Defendants.

DEPOSITION OF: CHRISTINE WATTS

DATE: January 29, 2008

TIME: 5:15 p.m.

LOCATION: LEATHERWOOD WALKER TODD & MANN, P.C.
300 East McBee Avenue, Suite 500
Greenville, South Carolina

TAKEN BY: Counsel for Defendant,
CENTURY BMW

REPORTED BY: KATHY P. TAYLOR,
Registered Professional Reporter

Computer-Aided Transcription By:
A. WILLIAM ROBERTS, JR. & ASSOCIATES

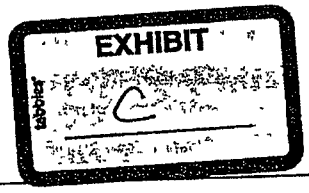
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ALISON DANNERT, Paralegal

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STIPULATION

It is stipulated by and between Counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, Rule 30, that all objections as to Notice of this deposition are hereby waived, that all objections except as to form are reserved until the time of trial, and that the deponent does not waive reading and signing of this deposition.

* * * * * * * * * * *

CHRISTINE WATTS,

being first duly sworn, testified as follows

EXAMINATION

BY MR. BLACK:

Q. Good evening, Ms. Watts. Could you state your name and your address for the record, please.

A. Christine Watts. And my address is 3729 Harwick, H-A-R-W-I-C-K, Place, Charlotte, North Carolina 28211.

Q. And we haven't met before, but my name is Dennis Black. I'm an attorney from a law firm called Williams & Connolly. And you understand I represent Century BMW and some other car dealerships in this dispute?

A. Okay. Yes, I do.

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Q. Okay. And the other people sitting here also represent -- at least on this side of the table -- also represent Century BMW, until you get to the guy at the end, who represents some other dealerships. And I take it you know your own counsel.

A. Yes, sir.

Q. (Pointing) And he represents some car dealerships, too.

A. Okay.

Q. So just so you know who everyone is. Have you ever had your deposition taken before?

A. I have not.

Q. Okay. Let me give you a couple of ground rules. I'll be asking a bunch of questions. Hopefully you'll be answering them. Try to answer them aloud and with words.

A. Okay.

Q. Because the court reporter here is trying to take everything down, and she can't take down gestures and nods and shakes and shrugs. Is that acceptable?

A. Yes.

Q. And if you say -- if you nod or shake your

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head, one of us may say is that a yes or is that a no.
A. Okay
Q. We're not trying to be rude, we're just trying to keep a clear record
(Ms. Chapman entered the deposition.)
BY MR. BLACK:
Q. The -- also try and avoid uh-huh and huh-uh, because they look garbled on the transcript.
A. Yes.
Q. If you could try and let me finish my questions before you jump in with your answers, that will help keep a clean record. also and I'll try and give you the same courtesy of letting you finish your answers before I jump in with another question. Is that acceptable?
A. Yes.
Q. If I ask any garbled questions, as I'm prone to do from time to time, please if you don't understand it, ask me to rephrase the question or tell me that you don't understand it. And the rules here in South Carolina require you to direct any requests for clarification to me and not to your own counsel. Is that acceptable?
A. Yes, I understand.

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Q. And the rules also require that you not talk with your counsel about the deposition or the case while we're going on with the deposition. Is that acceptable?
A. I understand.
Q. Okay. What, if anything, did you do to prepare for your deposition?
A. I had a meeting with my lawyers.
Q. Okay. And who was present for that meeting?
A. Melanie and Brady.
Q. Anyone else?
A. My father, Mike Watts.
Q. Was that Friday -- Sunday night?
A. Yes.
Q. And how long approximately did the meeting last?
A. Maybe an hour.
Q. The -- and then as you were driving home from the meeting, did you have a chance to have a further discussion with your father about the deposition?
A. We did not talk about that on the way home.
Q. Since you -- since Sunday night, have you talked to anyone else in preparation for your deposition?

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A. I talked to Melanie and Brady before I came today.
Q. Okay. Did you have a chance to talk to your father after he was finished with his deposition today?
A. Yes.
Q. And when was that?
A. Maybe lunchtime.
Q. Okay. And was it in person or on the phone?
A. It was just on the phone.
Q. Okay. And who called who?
A. I called my father to ask him how long it would take.
Q. All right. And what did he tell you?
A. Two hours.
Q. Okay. Hopefully, since we got some information from him this morning, we won't have to repeat it with you, and we'll be even quicker. Did he tell you anything about the questions that were asked at the deposition?
A. No, he did not.
Q. Aside from the length of the deposition, did you have any other discussions about the

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deposition with him?
A. No.
Q. Other than Melanie and your father today, did you -- have you talked to anyone else in preparation for your deposition?
A. Just my boss, that I had to go to the deposition.
Q. Okay. Could you describe for us your educational background since high school?
A. I have a bachelor's and a master's degree in accounting.
Q. And what year did you get your bachelor's?
A. '03, 2003.
Q. And from what school?
A. College of Charleston.
Q. And from what school did you get your master's?
A. College of Charleston.
Q. And what year was that?
A. 2005.
Q. And you said that was in accounting?
A. Accounting.
Q. And any subspecialty or -- in accounting?
A. No.
Q. Since getting your master's in 2005, have

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you pursued any other studies?
A. Please rephrase.
Q. Since – have you done any further schooling since 2005, when you got your master's?
A. Only accounting-related
Q. So you're continuing to study accounting?
A. Yes, sir
Q. Okay. Are you going for a Ph.D or –
A. No, I – you have to do it for – to get a CPA.
Q. Okay. And have you received – do you have a CPA?
A. No
Q. What's the stages in getting a CPA?
A. I can sit for the CPA, but I have to have a certain number of hours before – accounting experience before I can actually get my license
Q. Okay. And how far along in that process are you?
A. Getting pretty close
Q. Okay. So have you scheduled to take the exam?
A. I have not. I filled out the application
Q. The – where have you – did you work at all when you were at the College of Charleston?

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A. I did not work at College of Charleston
Q. Okay. And is that true through your master's degree?
A. Between my undergraduate and graduate, I had an internship with PriceWaterhouseCoopers.
Q. And where was that?
A. In Spartanburg, South Carolina.
Q. And what was involved in the internship?
A. Audit work.
Q. So that would have been in 2003?
A. 2004.
Q. And then while you were – how long did it take to get a master's degree?
A. Just one year
Q. Okay. And were you working while you were studying for your master's?
A. I was not
Q. Okay. The – we learned from your father this morning that – I'm sorry, I forget Melanie's last name – you're Melanie's former roommate?
A. Yes, I am
Q. And what is Melanie's last name?
A. Blease
Q. What?
A. Blease

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Q. Blease. And when were you Melanie's roommate?
A. Undergraduate, 2002 and -3
Q. And not thereafter?
A. Not thereafter
Q. Okay. Have you remained friends with Melanie thereafter?
A. Yes, I have
Q. Up until today?
A. Yes
Q. Since you got your – what month did you get your master's in 2005?
A. August
Q. August. And since you got your master's have you become employed?
A. Yes. I worked for PriceWaterhouseCoopers until June of this year.
Q. June of last year?
A. This – yeah, last year
Q. And so when did you start with PriceWaterhouseCoopers?
A. 2005
Q. Immediately upon graduating in August?
A. In – September 1st.
Q. And what position did you take?

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A. Audit associate
Q. And what were your job responsibilities?
A. Handling client relationships, performing audits of all types of nature
Q. Were you focused in any particular industry or business?
A. Manufacturing
Q. And were you an audit associate throughout your tenure at PriceWaterhouseCoopers?
A. I was
Q. Okay. And you – you left in June of 2007?
A. Yes
Q. And did you take another position in June of 2007?
A. I started July 1st with Dixon Hughes
Q. And what is Dixon Hughes?
A. It is a regional accounting firm.
Q. And is that in Charlotte, North Carolina?
A. Yes, sir
Q. And what position did you take in July of 2007 with Dixon Hughes?
A. Audit associate
Q. And do you focus on any type of business or industry?
A. Manufacturing and non-profit.

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Q. And do you remain an audit associate today?
A. I do
Q. Does PnceWaterhouseCoopers have its employees sign arbitration agreements when they become employed?
A. Not to my knowledge no
Q Do you know if you signed an arbitration agreement with PnceWaterhouseCoopers?
A. Not that I'm aware of, no
Q. Same question for Dixon Hughes, do they have you sign an arbitration agreement?
A. No
Q Your father told us this morning you were introduced to the lawyers that are now representing you through your friend, Melanie
A. That is correct.
Q Do you recall when you first talked to Melanie about this case?
A. I do not remember
Q Do you know how long it was in advance of the case being filed?
A. I do not know
Q In your discussions with Melanie prior to your retaining counsel, did the subject of your having signed an arbitration agreement with Century

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BMW come up?
A. No
Q In your conversations with anyone other than counsel and their staff prior to your – the lawsuit being filed, did you discuss the fact that you had signed an arbitration agreement with Century BMW?
A. No.
Q. How many vehicles have you been the primary driver of in your life?
A. Four
Q And what was the first one?
A. Ford Ranger
Q And when did you become the primary driver of that vehicle?
A. When I was 15
Q So that would be what, approximately what year?
A. '95
Q And did your family own that vehicle before you became the primary driver of it?
A. Yes
Q Okay Were you present when the vehicle was purchased?
A No

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Q. Prior to owning that – driving that vehicle, had you ever been present when anyone purchased a car from a car dealership?
A. No
Q. After the Ford Ranger, what was the next vehicle you were the primary driver of?
A. Toyota Celica
Q And how many years later was that?
A. One year
Q. And did your family own that car before you became the primary driver?
A. No
Q Was it purchased for you?
A. Yes
Q Was it a new or used vehicle?
A. Used
Q Used. Who paid for it?
A. My parents, Mike and Phyllis Watts
Q Were you involved in choosing it?
A. Yes
Q Was it purchased at a car dealership?
A. Yes.
Q Do you remember which one?
A. No
Q Were you present when the car was

Page 17

purchased?
A. No
Q Did your – who was – who was primarily involved in the back and forth with the dealership on the purchase?
A. My father, Mike Watts
Q And did he negotiate the price of the vehicle?
A. I have no idea.
Q Okay So you weren't there at all
A. No, sir
Q Okay What was the next vehicle that you became the –
A. Ford Mustang.
Q And when was that?
A A year after the Celica
Q So now you're 17?
A. Uh-huh
Q Okay And did you own that – was that vehicle owned by your family prior to you becoming primary driver?
A. No
Q What happened to the Celica?
A. I just didn't like it.
Q Okay So it was – so the Ford Mustang was

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purchased from a car dealership?
A. Yes
Q. And were you present when it was purchased?
A. Yes
Q. And did you take part in any negotiations?
A. No
Q. Did your father?
A. Yes
Q. And did he -- were you present when he negotiated the price of the vehicle?
A. Yes.
Q. Okay. How long -- how long did that take, if you recall?
A. I don't remember
Q. Were you a co-owner of any of the vehicles we've discussed so far --
A. No
Q. -- the Ranger, the Celica, or the Mustang? So they were all in your father's name, and mother's, maybe?
A. Yes
Q. So I take it you didn't sign any paperwork associated with those vehicles?
A. No
Q. How long did you -- were you the primary

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driver of the Mustang?
A. Three years.
Q. And is that when you got the Montero?
A. Yes
Q. The -- was the Montero purchased at a car dealership?
A. No
Q. Okay. Where was the Montero purchased from?
A. A family friend
Q. And who purchased it?
A. Mike Watts
Q. And what did you do with the Mustang?
A. Sold it.
Q. Just in a private sale?
A. Private sale
Q. And you were the primary driver of the Montero up until you got the Z-4?
A. Yes
Q. Aside from the transaction at Century BMW when you purchased the Z-4, had you ever signed an arbitration agreement before?
A. No
Q. Had you ever before been requested to sign an arbitration agreement and refused for whatever

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reason?
A. No
Q. At the time you were in Century BMW buying the Z-4, did you have an understanding what arbitration is?
A. No
Q. So I take it at the time you didn't have a view whether it was a good thing or a bad thing.
A. No
Q. No, I'm -- no, I'm wrong, or no, you didn't have a view?
A. No. I didn't have a view of -- I didn't really know what it was, so no. I didn't have a view of it.
Q. Okay. Up until today, have you ever participated in arbitration in any capacity as a witness or a party or anything like that?
A. No.
Q. So I take it you've had no bad experiences with arbitration.
A. No
Q. As I understand it, the Z-4 was a graduation present of sorts for you.
A. Yes.
Q. And you were the person that primarily did

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the research in looking for a car before you purchased it; is that true?
A. That's correct.
Q. Can you describe for us what types of things you did -- how long did the process of looking for a car take from beginning to end?
A. Can you rephrase? Like truly looking, or just kind of researching?
Q. Well, when did you first start researching?
A. Two months beforehand
Q. And about six months before you had come into Century BMW and test driven a car?
A. Yes
Q. Were you looking to buy a car at the time?
A. No, not really
Q. So was it more in the -- and I don't mean this disparagingly, but was it more in the nature of a joyride test drive than as part of a serious looking for a car?
A. Well, I knew I would eventually, once I graduated, so I guess it was a joyride
Q. Okay
A. Just kind of checking out things
Q. What type of car did you test drive?
A. 3 Series

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Q. And you said you started researching a couple of months before the actual purchase What did you do to start researching?
A. I looked at safety, insurance rates, what I think the taxes would be. That's all
Q. Did you start looking at different types of models and makes of cars?
A. I did.
Q And in what way did you do that?
A. Internet.
Q. And were there any particular sites you looked at at the – on the internet?
A. Probably Kelley Blue Book. Probably the individual car websites, like manufacturer websites type things
Q. Did you look at all at purchasing a car from a private individual as opposed to a car dealership?
A. No
Q. You knew from at least your own past experience that one option was you didn't have to go to a car dealership at all, you could just buy it from some individual that was looking to sell their car; is that –
A. Yes

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Q. How much before you purchased the Z-4 did you actually go into a car dealership to look at cars for the first time during this particular search?
A. Maybe a month or two Maybe a month or two
Q And do you recall how many different car dealerships you visited in the month or two prior to coming into Century BMW?
A. Two.
Q And what were they?
A. Ford in Greenville I don't know –
Q Is that Fairway Ford?
A. You might be correct.
Q. Over on Laurens Road?
A. Yes, sir
Q Okay And did you test drive a Mustang there?
A. Yes
Q And was that a new Mustang?
A. Yes, it was
Q And what other dealership did you go into?
A. Century BMW
Q So only one dealership other than Century BMW?

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A. Yes
Q Did you visit a Ford dealership in Greenwood?
A. Greenwood? Not that I remember
Q. Were you aware of your father visiting another Ford dealership about buying a – possibly buying a Mustang for you?
A. I don't remember
Q. Had you – prior to coming into the Century BMW, had you talked to any other car dealerships by phone or e-mailed back and forth with them or anything?
A. No, I had not
Q Putting aside the test drive of whatever – do you remember what car you test drove six months before?
A. 3 Series.
Q Oh, that's right. I already asked you that. How long before you actually purchased the car at Century BMW did you come into the dealership during your search for a vehicle?
A. Can you please rephrase that question?
Q Yes Your father said that you – your first visit to Century BMW in connection with your search was not the day you purchased the vehicle, is

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that right?
A. That is correct.
Q Okay How many days or weeks before you actually purchased the vehicle did you first come into Century BMW in connection with this search?
A. Can I just – are you saying when I went and test drove the one that I bought, how long before I went in and purchased?
Q Yes
A. Three or four days
Q. And on your first visit to the dealership, did you go alone or were you accompanied by anyone?
A. My father was with me, Mike Watts
Q And anyone else?
A. No.
Q And when you got to the dealership, did you know what car you wanted – were interested in when you first got there, or did you look around and compare the various vehicles?
A. When I test drove or when I bought?
Q When you came in three or four days before you bought.
A. I was just looking around.
Q Okay And did you and your father look around on your own or were you accompanied by

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anyone from the dealership, or a little of both?
A. I don't -- I really don't remember
Q. Okay. Do you remember at all having any interactions with a salesperson that day?
A. No, I don't remember
Q. Okay. Did you -- have you heard of a woman called Elizabeth Courtney?
A. Yes.
Q. And who is Elizabeth Courtney?
A. She's the one we actually -- the day we purchased it, we talked to
Q. Okay. Do you recall whether you had any conversations with her on the -- when you visited three or four days before you purchased it?
A. I think we did, yes
Q. Okay. And what, if anything, do you recall about your conversations with her three or four days before you purchased the car?
A. I don't remember
Q. Who primarily interacted with her in that visit, was it you or your father?
A. My father
Q. And did you overhear whatever they were saying or were you off looking at cars while they were talking?

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A. I was looking at cars
Q. Did you test drive one or more vehicles during that visit?
A. I test drove the vehicle I bought.
Q. Okay. So -- and no other?
A. No other
Q. When you test drove the vehicle, was anyone with you in the car?
A. My father
Q. Was the salesperson in the car?
A. It's a two-seater, so no
Q. Did your father test drive the car?
A. I don't remember
Q. Do you recall one way or the other whether there was any pricing information about the vehicle on the vehicle?
A. Yes
Q. And what do you recall about that?
A. I remember it was around 31 -- about 32,000
Q. And how was that displayed? Was that displayed somewhere on or in the vehicle?
A. It was 34. Sorry. Yes, it had a big sticker
Q. Okay. And your recollection is the number

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34,000-something was on there?
A. Something like that.
Q. Was it also written in the windshield or anything like that?
A. Not that I remember
Q. While you were at the dealership that day, did you have any discussions with Ms. Courtney or any other Century BMW employee about how much you could buy the vehicle for?
A. No. That was later on the telephone
Q. Okay. Did you understand when you were in the dealership that the price was negotiable?
A. Yes
Q. So you knew whatever that 34 figure was was not a take-it-or-leave-it number?
A. Yes
Q. Do you recall any discussions you had with anyone from Century BMW during that visit that day?
A. No, I do not.
Q. Okay. Do you know whether your father had any such discussions about pricing that day?
A. I do not know
Q. And you left the dealership that day without purchasing the car, right?
A. That is correct.

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Q. Why?
A. We wanted to -- I needed to look at my budget and talk to our -- the finance people that we work with and see what rate I could get and how much I could get from them for the loan.
Q. Were you aware that Century BMW would normally offer you financing for a purchase of a vehicle there?
A. Yes
Q. But you knew you didn't have to take Century BMW's financing if you didn't want to, is that fair?
A. That is correct
Q. So you understood it wasn't a requirement buying a vehicle at Century BMW that you enter into a financing agreement with them.
A. That is correct.
Q. Did you ever ask at any time, anyone from Century BMW whether they could give you a better rate than you were getting from your credit union?
A. No
Q. You said you -- did you always intend to finance with the credit union from the moment you got to the dealership?
A. That is correct.

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Q Did you personally have any discussions with the credit union about the terms of financing, or did your father do that?
A That would be my father
Q. And was that done by phone?
A That is correct.
Q. Were you present?
A No, I was not.
Q Did you sign any paperwork with the credit union before coming back to Century BMW?
A I did not. No
Q. Do you know if your father did?
A I have no idea.
Q. Did you visit the credit union in person before coming back to Century BMW?
A No, I did not.
Q Do you know if your father did?
A I have no idea
Q Okay Before you came back to Century BMW, had you already agreed on a bottom-line price for the vehicle with Century BMW?
A Yes.
Q And how did that occur?
A Via telephone.
Q Okay And who was it that dealt with

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Century BMW by telephone?
A My father, Mike Watts
Q. And who – who initiated the telephone calls; did your father call them first?
A That is correct.
Q. And had you had a – prior to your father calling Century BMW, had you discussed with your father what your goal was in terms of a price for the vehicle?
A Yes
Q And do you recall what your goal was?
A 31,000
Q 31,000?
A That's correct.
Q And was that after all taxes and whatever else, or was it –
A That's correct.
Q Had you discussed with your father what your worst-case scenario was so far as the cost of the vehicle?
A Yes, I did.
Q And was that different than what your goal was?
A That is correct.
Q Okay And what was – do you recall what

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your bottom-line break point was?
A 32,000, and it had to include the maintenance warranty
Q Did you know one way or the other whether the vehicle was still covered by the BMW warranty that covers a new car?
A I do not remember
Q The car was a 2004?
A That is correct.
Q And you were buying it in 2005, is that right?
A That's correct.
Q The – were you present when your father was having telephone calls with someone at Century BMW to discuss pricing?
A Yes, I was
Q Do you – was there one call or a number of calls?
A A number of calls
Q. Do you recall how many approximately?
A At least two.
Q Do you know – do you know one way or the other who he was talking to?
A Elizabeth Courtney
Q And do you know who made the first offer?

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A My father
Q And do you remember what it was?
A No, I do not.
Q Do you remember what the dealership's response was?
A No, I do not.
Q. Do you remember anything other than what the final agreed figure was?
A No, that's all I remember
Q Okay And what was the final agreed figure?
A 32,000
Q And do you recall what day that was that – was it the day after you were in the dealership or the day before you came back to the dealership or can you place in time where it was?
A I don't remember I know that it was over a weekend, and the credit union was closed, like a Sunday So there was some lapse of time I don't remember exactly
Q And after your father reached an agreement on the price with Ms Courtney – do you know if he talked to anyone else in the process?
A On the telephone? Not that – I do not know

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Q After he agreed upon the price, did you then return to Century BMW in person?
A That's correct.
Q And did you know if anyone visited the credit union in between those two events?
A I do not know
Q. Okay Did you bring any paperwork to the credit union from Century BMW?
A. I do not know
Q And what day of the week did you purchase the vehicle do you recall?
A I do not know
Q When you went back to Century BMW did you go back alone or with anyone else?
A With my father and mother
Q Okay
A Phyllis and Mike Watts
Q Okay And your mother is Phyllis Watts?
A That's correct.
Q So this time, all three of you were present?
A That's correct.
Q And did you all three pretty much stay together during the time you were there?
A No My mother looked at cars

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Q Okay So your -- you and your father dealt with the transaction, and your mother --
A That's correct.
Q -- went to see if you could purchase yet another vehicle?
A That is correct.
Q When you -- do you remember who you -- what Century BMW employee you first dealt with on your return visit to the dealership?
A Elizabeth Courtney
Q Okay And when you came in, did she come and greet you?
A That's correct.
Q And did y'all have a discussion with Ms Courtney?
A That's correct.
Q And what do you recall about that?
A We briefly discussed how excited I was about the car, and that was about -- finished looking at seeing the price, and that was about it.
Q Did -- do you recall whether Ms Courtney had you sign any document or documents?
A We may have signed the price with her, and then we ended up talking to a different guy for the rest of it.

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Q Do you recall that there was a handwritten document that you -- a pre-printed with numbers written in by hand, that you signed?
A Pre-printed?
Q A pre-printed buyer's order, but whereas the final contract would have all the numbers typewritten, this was a handwritten?
A Can you tell me what -- did it say anything particular other than the price?
MR. BLACK Can you put in front of her the Exhibit 1 that was marked this morning?
A (Viewing document.) I don't remember signing this
BY MR. BLACK
Q Okay Exhibit 1 is a collection of documents I'll represent to you it's the dealership's file on your transaction
A Okay
Q. If you turn to the page -- you see there are little numbers that have been printed in the bottom right-hand corner If you could turn to Page CBM-0000025
A 00, what did you say?
Q 25
MR THOMAS Have you got an extra copy?

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MR. BLACK Yeah I'm sure the answer is yes. I have one more
MR THOMAS That's for my illustrious co-counsel there Thank you
A Retail Buyer's Order?
BY MR BLACK
Q Yes.
A Okay
Q And you see that the information in all the boxes has been filled out by hand on that form
A I see that, yes
Q And it totals out to the price you testified before, about 32,000?
A Yes.
Q And do you know if -- who -- is that your signature at the bottom of the page where it says, co-buyer?
A Yes
Q And do you recall who gave you this document to sign?
A I do not remember
Q Did -- was there any further discussion with Ms Courtney about the terms of the sale, any terms of the sale?
A Not that I remember

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Q Okay And she then introduced you to another person at the dealership?
A That is correct
Q And do you recall what his name was?
A Corey, maybe. I know he's the finance -- he was the finance guy
Q. And Ms. -- Ms Courtney, was she always professional in her dealings with you?
A Yes, she was
Q Always nice?
A Very much so
Q Didn't put any undue pressure on you?
A No
Q The same for Corey?
A He was -- what do you mean?
Q Did he -- was he a nice person to you, behaved professionally?
A He did
Q. Okay Did he -- didn't put any undue pressure on you?
A About the warranty a little bit, yes.
Q Okay So he tried to sell you a warranty?
A That's correct.
Q Okay We'll get to that. The -- and what did you understand Corey's position was at the

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dealership?
A I didn't understand his position.
Q Okay Where did you meet with Corey?
A In his office
Q. And was that in a little cubicle-like office off the dealer showroom?
A That's correct.
Q And who was present?
A Him, me, and my father
Q. And as between you and your father, who did most of the talking with Corey?
A My father
Q Okay Did you do any talking?
A No
Q The -- I think you told us Corey tried to sell you a warranty
A That's correct.
Q And did he also try to sell you a number of other products?
A Yes, that's correct.
Q And let me ask you to turn to Page CBM, five zeros, and then a 2 so the second page of the document Do you see that's a document entitled Century BMW Menu of Investment Enhancements?
A Uh-huh

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Q Is that a yes?
A That's -- yes
Q And your father's signature appears at the bottom of that page in the right?
A That's correct.
Q. And do you recall Corey going through this menu with you, trying to sell you the various products listed?
A Yes
Q And how long did that process take, if you recall?
A. Maybe 30 minutes
Q Okay And that's 30 minutes of him trying to sell you products as opposed to 30 minutes being in the office altogether?
A I think so
Q. Okay
A Yes
Q And were you eager to get out of the office?
A Yes.
Q You wanted to go drive your car?
A That's correct.
Q The -- notwithstanding whatever aggressive sales techniques Corey used, you declined to buy any

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of these agreements; is that fair?
A That is not correct. We did buy one of the maintenance agreements.
Q Did you buy it while you were buying the car?
A Yes.
Q Okay So if your father testified that you didn't buy it until the car was approaching 50,000 miles, would he be incorrect?
A No, that was correct. It was included -- I'm sorry -- in the initial -- we upgraded it after 50,000 miles
Q Okay Do you remember when that was?
A April, May of this year
Q. Okay So about eight months after you sued the dealership?
A That's correct.
Q And you bought it --
A I guess
Q And you bought it from the dealership?
A That's correct.
Q And the warranty you're referring to, if you turn to the next page, the third page of the document, do you see that it indicates that it's still under the factory warranty?

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A. Yes
Q. So it was when that -- when the factory warranty was about to expire is when you, what you said upgraded to the extended service plan
A. That's correct.
Q. Okay. But at the time you were in the dealership after hearing the 30-minute pitch from Corey, you declined to purchase any of the things he tried to sell you, is that right?
A. That's correct.
Q. So you knew that it wasn't a requirement of buying the vehicle at Century BMW that you enter into any of these agreements?
A. That's correct.
Q. Okay. And none of them were offered on a take-it-or-leave-it basis, that you can't get the car unless you get this
A. That's correct.
Q. Once Corey got done trying to sell you investment enhancements, what was the next thing that happened? Was that the first thing you did when you came back to the -- his office?
A. He did that while we were signing our papers.
Q. Okay. So he did what while you were

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signing your papers?
A. Was selling us the warranties while we were signing all our documents.
Q. Okay. How many documents do you recall signing?
A. I have no idea.
Q. More than 30?
A. I have -- I do not remember.
Q. 20?
A. I have no idea.
Q. How long did it take to sign -- sign your names as many times as you signed it?
A. Me? Probably ten minutes.
Q. Ten minutes, so you were --
A. Ten. 15 minutes.
Q. So it's your testimony for ten or 15 minutes you were signing your name over and over again to documents?
A. That's correct.
Q. And were you reading the documents as you signed them?
A. No.
Q. How long does it take you to sign your name?
A. Maybe half a minute.

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Q. It takes you 30 seconds to sign your name?
A. Sometimes.
Q. So if you spent ten minutes signing your name and it took you 30 seconds a time, you must have signed your name about 20 times.
A. That may be correct.
Q. What?
A. That could be correct.
Q. Okay. And if it was 15 minutes, then it could be about -- it could be, if it took you 30 seconds a time, 30 times you signed your name.
A. That could be correct.
Q. Okay. Did you -- I forget what you answered. Did you review the documents you were being asked to sign?
A. Nothing but the price.
Q. Okay. Did Mr. -- did Corey do anything to prevent you from reviewing the documents?
A. No.
MR. BLACK: I'm going to take a break.
THE WITNESS: Okay.
(A recess transpired.)
BY MR. BLACK:
Q. Ms. Watts, could you get Exhibit 1 back in front of you. And could I ask you to thumb through

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the entire exhibit and identify for me each of the pages in the exhibit in which your signature appears?
A. Would you like me to do it along and along, or --
Q. Yeah. How about, what's the first page on which your signature appears?
A. Number 1.
Q. Okay. What's the next page on which your signature appears?
A. 5.
Q. Okay. What's the next page on which your signature appears?
A. 14.
Q. Okay. We're up to three. What's the next page on which your signature appears?
A. Technically, 21.
Q. 21 is --
A. That's my driver's license.
Q. -- was your driver's license. You didn't sign that at the dealership, right?
A. No.
Q. Okay. So why don't we ignore 21. And what is the next page on which your signature appears?
A. 25.

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Q We're up to four And what's the next page after 25 on which your signature appears?
A 31
Q And the next page? We're up to five
A 42.
Q Up to six Is there any other page on which your signature appears?
A No
Q So if these are the documents from the transaction file, you signed your name six times?
A Some of them I signed more than once
Q Okay So six -- how many -- did you count how many you signed more than once?
A No I did not
Q Okay So you signed six separate documents
A Uh-huh.
Q Okay Did you object to signing any of the documents that you were given to sign while you were in the dealership?
A Of course not I just wanted the car, so --
Q Okay But you -- whether or not you wanted the car, did you voice any objection to signing any of the documents you were given?

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A No
Q Okay Did you ask any questions about any of the documents you were given?
A No.
Q Did you voice any complaints about any of the documents you were given?
A No
Q Am I correct that the -- as you were thumbing through the documents you signed, one of them was an arbitration agreement?
A That's correct.
Q And am I correct that to your recollection, nothing at all was said orally about that arbitration agreement in the office with Corey?
A That is correct.
Q Okay So no one said to you that you were required to sign that document in order to get the vehicle, is that fair to say?
A That's correct
MR BLACK That's all I have
MR THOMAS Can we take a quick break?
(A recess transpired)
EXAMINATION
BY MR. SPEARS
Q Christine, I'm Mike Spears When is the first time you and I have met?
A Today, before I got here.
Q Okay Did we talk about the case at all that you recall?
A No
Q Okay Let me show you a copy of Plaintiff's (sic) Exhibit 1, which is allegedly the dealer's file with the documents from your transaction Do you remember which documents were gone over during your deposition by Mr Black when he asked you which documents you signed and what was told to you about it? I'm not asking you every document you signed. But he asked you which documents you thought you had to sign
MR. BLACK. Objection. I didn't ask that.
MR SPEARS. Okay
BY MR. SPEARS
Q Which documents do you -- you certainly signed the document of CBM-5; did you not?
A That is correct.
Q Okay As we sit here today, do you know what it is?
A No
Q Do you -- did you know what it was when you bought the car?

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A No
Q Okay Why did you sign it?
A I thought I had to to get the car
Q Okay Do you publish your personal information on Facebook on the internet?
A On Facebook? No, I do not.
Q Okay Are you in the habit of giving out personal information willie-nillie to anybody?
A No
Q Have you ever been cautioned by anyone not to do that for whatever reason?
A Yes, I have
Q Okay Look at CBM-1 Did you sign that?
A Yes.
Q Okay Did you know what it was when you signed it?
A No
Q Okay Did you realize by signing CBM-1, that you were being given notice to tell you how they were going to use your non-public -- personal information about you, and that they could release it to market service providers amongst affiliates of BMW Century -- and to other third parties, we may share all private information about you as a consumer, customer or former customer with other

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non-affiliated parties as permitted by law Did you see that?
A. No, I did not. I did not read it.
Q. Okay. Did you know you were doing that when you signed it?
A. No, I did not.
Q. Okay. Is it your habit to release personal information to anyone?
A. Not usually.
Q. Okay. Let's go to Number 14. Okay? Was CBM-14 passed to you?
A. I'm sure that it was in the packet.
Q. Okay. Is that your signature?
A. That is correct.
Q. Did you know what you were signing?
A. No. I did not.
Q. Why did you sign it?
A. I thought I had to to buy the car.
Q. Okay. In what way was any implication given or any mood left with you that it was a document necessary for you to buy the car?
MR. BLACK: Object to the form of the question.
BY MR. SPEARS
Q. Go ahead.

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A. Can you please repeat it?
Q. Certainly. Why did you think you had to sign any or all of these documents in order to get the car?
A. The way it was presented, I just thought I had to sign everything.
Q. Okay. Now, were you in a small little cubicle with Corey and your dad and yourself?
A. That is correct.
Q. All right. Was there a machine in there that printed out these documents, and one by one they were passed across the table to you?
A. I just remember a big packet.
Q. A big packet. Okay. Were the documents removed from the packet by someone in the room, or were they just clipped together like we kind of have them clipped together right now?
A. That is how I remember it.
Q. Okay. What were you told about the packet? Was it passed to you?
A. It was passed to me.
Q. Okay. And were you merely to look at it, or were you told to do anything with the packet?
A. To basically sign. They had the little flags.

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Q. All right. That's my point. How did you know which pages to turn to to sign them?
A. Flags.
Q. I've got a little sticky, a little red sticky, on this particular page. Were there little flags similar to this?
A. That is correct.
Q. And were you told that you needed to sign on every page with the flags?
A. Yes.
Q. Did you turn to that page and sign it?
A. That is correct.
Q. Did you read it before you signed it?
A. No.
Q. Okay. And did you know what any or all of those pages meant as you signed them?
A. No.
Q. Okay. Now, let me ask you if you would look with me at CBM-25. And CBM-25 has a purchase price of what written in hand?
A. 32,980.
Q. Did you agree to that? Is that what you -- was that your breaking -- your break point, 32,980?
A. I --
MR. BLACK: Object to the form of the

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question.
BY MR. SPEARS
Q. Go ahead.
A. I agreed to 32.
Q. Okay. Is that number higher than 32?
A. That's correct.
Q. Did you in any way agree to pay that number?
A. No.
Q. Okay. The next says, Additional options. And it has $1604.50. Now, what can --
MR. BLACK: I apologize. What page are you on?
MR. SPEARS: CBM-25.
BY MR. SPEARS
Q. $1,604.50. Does that appear, as you look at it, to be a -- is there a minus in front of that?
A. No, there's not.
Q. Does that -- does that appear -- I mean, you're an accounting master's graduate. Does that appear to be in addition to 32,980, without looking at the numbers below it?
A. It appears to be --
MR. BLACK: Object to the form of the question.

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BY MR. SPEARS
Q. Okay Does it in any way appear to be something that's going to be subtracted from that as an additional option?
A. No, it doesn't.
Q Okay Can you buy an option that you're familiar with from a car company where it will depreciate the cost of the car?
A. No, I do not.
Q. Okay Yet does the total number show that 1604 50 has been subtracted from 32,980?
A. That's correct.
Q Did you know what in the world that's for?
A. No, I do not
Q. Did you know then?
A. No, I did not.
Q. Okay Then sales tax is put down in the amount of what?
A. 300.
Q. And then a transfer of license is put down in the amount of what?
A. 25
Q And then pre-printed on here is a charge, and what's that for?
A. I have no idea.

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Q What does it say?
MR BLACK. Let me just object that this has extended beyond what the scope of what the Court allowed this deposition for And it's your client, so you can ask whatever you want, but the –
MR. SPEARS It's for arbitration. I'm getting to –
MR. BLACK. I don't think it is for arbitration, but go on.
BY MR. SPEARS
Q What does it say it's for?
A. Recording and processing fees
Q. Okay And what did the total end up being?
A. 32,000
Q So somehow or another it ended up being exactly what your break point was?
A. That's correct.
Q Okay Did you sign that document?
A. Yes, I did
Q. Okay Did you think 1604 was being added to or subtracted from your car, or did you have any idea about that number?
A. I didn't have –
MR BLACK. Object to the form
A. I didn't have any idea what that number

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was.
BY MR. SPEARS.
Q. Okay If I went through the rest of these documents where your sig- – signature appears on 31 and 42, did you have any idea what you were signing?
A. No, I did not.
Q Okay On Page 42, CBM-42, okay, what's the total price shown there?
A. 32,000
Q. Okay Did you know what this is?
A. No, I did not.
Q Okay As you read it today, what does it say?
A Retail Buyer's Order
Q. Okay Do you see anywhere on here – have you read it, by the way word for word?
A. No, I have not.
Q Okay Have you – do you see or did you see – well, if you've never read it, you wouldn't know whether the Retail Buyer's Order references any other document or not, would you?
MR. THOMAS Object to the form of the question.
A. I would not.
BY MR. SPEARS

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Q Okay Okay Now, you were not required to sign it in any regard, but do you have any idea what CBM-45 concerns?
A. Just a checklist.
Q Okay
A. Everything we had to sign
Q It's a check –
MR. BLACK. Excuse me Could you – could you read back that answer?
THE COURT REPORTER. I missed that last part where he interrupted
MR BLACK. Did you get the checklist of –
THE COURT REPORTER. Just a checklist.
MR. BLACK. And did you get what she said after that?
THE COURT REPORTER. I did not. That's what I missed.
A. – of everything we had to sign
BY MR SPEARS
Q Okay Now you didn't sign this checklist, did you?
A. No
Q Okay And have you looked over it since the time that the lawsuit was brought?
A. Yes

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Q Okay Are there things here that are not checked off with checks?
A Yes.
Q Okay Did you finance the car through BMW?
A No
Q Okay Okay Were you of the opinion you had to buy -- that you had to sign the documents where presented with the flags in order to get the car, or not?
MR. BLACK Object to the form of the question
A Yes
BY MR SPEARS
Q Okay Any doubt in your mind about that?
MR BLACK Object to the form of the question.
A No.
BY MR. SPEARS:
Q As to that being your opinion at the time?
A There's no doubt in my mind
Q Okay And how far in your education process had you gone when you bought this car?
A I had not completed my master's degree
Q Okay
A I was within a month or two

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Q So would it be fair to say you had a baccalaureate and were at the end of your master's?
A That's correct.
Q Okay And you had been the primary driver of four previous vehicles?
A That's correct.
MR. SPEARS Okay Give us a second
(A discussion was had off the record and out of the hearing of the court reporter)
BY MR. SPEARS.
Q Why did you need this car? What were you going to utilize it for?
A Work purposes
Q Okay Did you need a way to and from work?
A I did.
Q Was this going to be your primary source of transportation?
A It was
Q Okay Did you need the car?
A I needed a car
MR SPEARS Okay That's all I have
EXAMINATION
BY MR BLACK
Q You were driving a Mitsubishi Montero at the time?

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A That's correct.
Q It was in fine working order?
A Yes
Q So you could have continued to drive that car to work; would that be fair to say?
A Yes It just had a lot of mileage
Q Okay You didn't need to buy a convertible BMW Z-4 luxury automobile to get to and from work, fair?
A Fair
Q Your job is an auditor?
A That's correct.
Q And as an auditor, you spend a lot of time reviewing documents, is that fair to say?
A Yes
Q And you spend a lot of time with numbers, is that fair to say?
A That's correct.
Q And it's important when you're reviewing documents as an auditor that you do so carefully, right?
A Yes.
Q And you're trained in reviewing documents carefully as an auditor
A Yes.

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Q And at the time you purchased this automobile, you were a couple of months from a master's degree in accounting; is that fair?
A That's correct.
Q So you have some facility with numbers; is that fair to say?
A Yes
Q Okay Look at CBM-000001, which was one of the documents that Mr Spears discussed with you Do you recall that?
A I do
Q And he read you some language about sharing private information with other third-party affiliates and the like, do you recall that?
A Yes
Q Would you agree with me that as he read the language, there was nothing unclear about the language?
A That is correct.
Q You understood what the language meant when he read it to you?
A Yes.
Q And had you read it at the dealership on that day, you would have understood it then?
A Yes

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Q. A number of the documents in Exhibit 1 were never shown to you while you were at Century BMW true?
A. That's correct.
Q For example, there are documents in the stack that include the commission vouchers for the salesperson?
A. That's correct.
Q And so it would not be accurate to say that this stack of documents was presented to you in the F and I office at Century BMW, true?
A. That is correct
Q. And, in fact, a stack of documents that actually contained your signature would be a stack six documents high, right?
A. That is correct.
Q. Let me ask you to turn to Page CBM-0025 Mr Spears called your attention to the 32,980 number at the top Do you see that?
A. Yes
Q Can you subtract in your head for me 1604 50 from 32,980?
A. Yes, I can
Q Does it come to $31 375 50?
A. Yes.

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Q So, in fact, the 1604 50 is being subtracted from the 32,980 on this form, fair?
A. That's correct.
Q And the numbers then total out to add up to the bottom-line figure you agreed to, 32,000, right?
A. That is correct.
Q Let me ask you to turn to Page 45 Is it fair to say the checklist on Page 45 includes many more documents than you actually signed?
A. That is correct.
MR. BLACK I have nothing further
EXAMINATION
BY MR. SPEARS
Q Okay Just to follow up on the questions that you were asked you in reply, on CBM-1, you were asked whether or not if you had read it at the time, you would be able to understand it?
A. That's correct.
Q You indicated that you could if you had read it?
A. Uh-huh
Q If you had read it and understood it and knew that you didn't have to sign it in order to get the car would you have signed it?
A. No

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Q Okay If you thought you had to get it -- had to sign it in order to get the car, would you have signed it?
MR. BLACK Object to the form of the question.
A Yes
BY MR. SPEARS
Q Okay Would the same be true of the other documents you signed?
A. That is correct.
Q Okay Now, out of the packet that was presented to you, were there documents in the packet that your father signed that you did not sign?
A That is correct
Q. But they were in the packet, though?
A. That's correct.
Q. Okay Were there documents in the packet that you didn't have to sign at all?
A. Yes
Q Okay So can we say that the packet itself merely had six documents in them, all requiring your signature, or did it have more than that?
A It had more than that.
MR. SPEARS: All right. That's all I have
MR BLACK Do you have the transcript up

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on the page?
THE COURT REPORTER. Uh-huh. What are you looking for?
MR. BLACK Go on back a few questions
(Viewing transcript on the computer screen)
MR BLACK. Oh, I remember I have no questions Thank you Can we stipulate that the exhibit is the same as this morning?
MR. THOMAS. Yes. Not a problem
(Defendant's Exhibit Number 1, Dealership transaction documents, was previously marked for identification)
(The deposition was concluded at 6 44 p.m)

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SIGNATURE OF DEPONENT

I, the undersigned, CHRISTINE WATTS, hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any:

PAGE	LINE	CHANGE	REASON

_____

CHRISTINE WATTS DATE

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CERTIFICATE OF REPORTER

I, Kathy P Taylor, Registered Professional Reporter and Notary Public for the State of South Carolina at large, do hereby certify that the foregoing transcript is a true, accurate and complete record

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof

WITNESS MY HAND, I have hereunto affixed my official seal this 31st day of January, 2008, at Greenville County, South Carolina

_____

KATHY P TAYLOR
REGISTERED PROFESSIONAL REPORTER
MY COMMISSION EXPIRES
JUNE 13 2017

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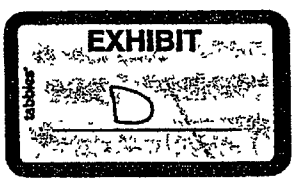
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	CIVIL ACTION NO.: 06-CP-02-1230
HEATHER HERRON, ET. AL.	)	
Plaintiffs,	)	**AFFIDAVIT OF CHRISTINE WATTS**
vs.	)	
CARMAX AUTO SUPERSTORES, INC., ET. AL.	)	
Defendants.	)	

PERSONALLY APPEARED before me, Christine Watts, being duly sworn, deposes and states that:

1. I am a named Plaintiff in this action and am competent to testify to the matters stated herein.
2. On June 25, 2005 I purchased a 2004 BMW from Defendant Sonic Automotive, Inc. d/b/a Century BMW. A copy of my Retail Buyer's Order is attached as Exhibit A.
3. The 2004 BMW was purchased to be and is my primary source of transportation.
4. I was hastily given other paperwork which the dealership required me to sign. This paperwork included the "Arbitration Agreement" that is attached as Exhibit B.
5. The "Arbitration Agreement" was not discussed or explained to me and was given to me on a "take it or leave it" basis.
6. I did not participate in the drafting of the "Arbitration Agreement" and had no



1

02028

voice in the formulation of its terms.

7. At the time of my purchase I did not understand the implications of arbitration or possess the experience necessary to make me aware of the implications of arbitration.

8. I did not have a lawyer present to provide me assistance in the execution of the paperwork required to purchase the 2004 BMW.

Further affiant sayeth not.

SWORN TO AND SUBSCRIBED BEFORE ME)
)
this ___ day of April 3, 2007)
)
Cynthia J Speed)
Notary Public for the State of South Carolina)
My Commission Expires: 12.5.15)

Christine Watts
Christine Watts

EXHIBIT A

RETAIL BUYER'S ORDER

CENTURY BMW
CENTURY MINI
2730 LAURENS ROAD • GREENVILLE, SC 29607
PHONE (864) 234-6437
www.century-bmw.com • www.centurymini.com

Name: Michael M Watts or Christine M. Watts (Spouse)
Street: 210 Providence Sq. Phone: 864-213-8498
City: Greenville State: SC Zip: 29615 County:
Employer: Phone: 864-370-7396
E-mail Address:

Date: 6-25-05 Stock No.: -15514
Salesperson: Elizabeth Courtney

PURCHASE

☐ NEW ☐ DEMO ☐ PRE-OWNED ☐ FACTORY CAR
Year: 04 Make: BMW Body Type: Series: 24
Cylinders: Serial No.: 4USBT33554LS50759 COLOR: Exterior / Interior

OPTIONS:
☐ PREMIUM PACKAGE ☐ SPORTS PREMIUM PACKAGE ☐ SPORTS PACKAGE ☐ COLD WEATHER PACKAGE
☐ ACTIVITY PACKAGE ☐ CONVENIENCE PACKAGE ☐ MOON ROOF ☐ LEATHER UPHOLS.
☐ PREMIUM SOUND ☐ IN DASH CD ☐ CD CHANGER ☐ HEATED SEATS
☐ ON BOARD COMPUTER ☐ ALLOY WHEELS ☐ CRUISE CONTROL
ENGINE: ☐ _____
TRANSMISSION: ☐ AUTOMATIC ☐ MANUAL

TRADE

Mileage: 15514
Year: Make: Body Type: Series:
Cylinders: Serial No.: COLOR: Exterior / Interior
Mileage: Options:

BALANCE OWED TO: Name & Address:
Phone: Contact:
A/C #:
Effective Dates:
INSURANCE INFORMATION: Company Name:
Agent: Phone:

LIEN: Name & Address:
Phone: Contact:
Account #:
Effective Dates:
Policy #: Effective Dates:
Driver's License #:

Remarks:

PRICE: (Including Preparation & Service Charges)	32980
Additional Options:	$1,604.50
TOTAL:	34,375.50
Allowance on Trade-in	
Cash Difference	
SC Sales Tax	300
Balance Owed on Trade-in	
Title and License ☐ New ☑ Trans ☐ Trans	25
Recording & Processing Fees	$299.50
TOTAL:	32,000
Service Agreement	
Insurance	
TOTAL:	
Cash on Delivery	
BALANCE DUE:	

READ CAREFULLY: Century BMW / Century Mini agrees to sell and the Buyer(s) agree to purchase the vehicle as above described at the price set forth. The Buyer shall remit full payment of the entire balance due on or before _____. This Buyer's Order constitutes the entire agreement between the parties and may not be changed except by an instrument in writing signed by the party to be charged.

CENTURY BMW CENTURY MINI
Must be accepted by an Officer of the Company

X _____ X _____
Buyer Co-Buyer

☐ **USED CAR CONTRACTUAL DISCLOSURE STATEMENT:** - "The information you see on the window form (Buyers Guide) for this vehicle is part of the contract. Information on the window form overrides any contrary provisions in the contract of sale."

Purchaser's Signature X _____

☐ **NEW VEHICLE DISCLAIMER OF WARRANTIES:** - I have read, understand and accept all provisions of the Manufacturer's Warranty Statement covering the new vehicle that I am purchasing. Furthermore, I understand that all warranties on the vehicle are those of the manufacturers. The seller, Century BMW / Century Mini, hereby expressly disclaims all warranties, either expressed or implied, including any implied warranty of merchantability or fitness for a particular purpose and Century BMW / Century Mini, neither assumes nor authorizes any person to assume for it any liability in connection with the sale of this vehicle. This disclaimer in no way affects the provisions of the manufacturer's warranties.

Purchaser's Signature X _____

This agreement between the undersigned buyer(s) and dealer is incorporated by reference into and is made a part of any separate retail installment or credit sale agreement between the undersigned buyer(s) and dealer ("Retail Financing Agreement"). Notwithstanding anything to the contrary in any other document, if there is a Retail Financing Agreement the undersigned buyer(s) understand and agree that the transaction evidenced by this agreement and the Retail Financing Agreement is contingent upon credit approval by, and assignment of the Retail Financing Agreement to, a third-party financial institution. If the Retail Financing Agreement is not accepted by a third-party financial institution, you must immediately return the vehicle referred to in this agreement, and the entire transaction evidenced by this agreement and the Retail Financing Agreement and this agreement shall be null and void.

Signed _____ (Buyer) Signed _____ (Dealer)

Signed _____ (Buyer)

02031

EXHIBIT B

ARBITRATION AGREEMENT
(All States Except CA)

DATE: 6.25.05 VIN: 4USBT33554LS50759

In this Arbitration Agreement ("Agreement"), "you" and "your" refers to the customer(s) who sign(s) below. "We", "us", and Dealer refer to the Dealer signing below, and includes the Dealer's employees, agents, and parent and affiliated companies (including, but not limited to, Cornerstone Acceptance Corporation) and their employees and agents. "Parties" refers to you and us. "Vehicle" refers to the automobile identified by the VIN set forth above. "Claim(s)" includes any and all disputes, claims or controversies between the Parties relating to the Vehicle or arising out of or relating to: (a) the application for and the terms of and enforceability of the sale, lease, or financing of the Vehicle, (b) the purchase or terms of any warranty, service agreement, maintenance plan, paint/undercarriage/interior protection product, anti-theft etching product and warranty, GAP protection, deficiency waiver addendum, or any or other product or insurance, (c) any claims of breach of contract, negligence, misrepresentation, conversion, fraud, or unfair and deceptive trade practices, (d) any claim of a violation of any state or federal statute or regulation, or (e) the Vehicle's condition, warranty, workmanship, servicing, maintenance or repair. All Claims must be brought within the time allowed by the applicable statute(s) of limitation. "Contract(s)" refers to any agreement(s) between you and us regarding the sale, lease, financing, service or maintenance of the Vehicle.

Upon the request of a Party, any and all Claim(s) shall be decided in binding arbitration before the American Arbitration Association (1-800-778-7879/www.adr.org) ("AAA"). The Parties may mutually agree to use another arbitration forum and/or qualified arbitrator. Unless mutually agreed otherwise between the Parties, any arbitration under this Agreement shall be conducted under the commercial arbitration rules of the AAA. To the extent that any Claim is deemed a "consumer dispute", the Parties agree that the fee schedule provided in the rules for consumer disputes of the AAA, if any, will apply. You can get a copy of the rules from the AAA. The arbitration hearing shall be conducted, at your option, in the federal district in which you reside or in which the Vehicle was purchased or leased.

The Parties waive the right to request arbitration for a Claim filed and maintained individually (as opposed to a class action) in your state's small claims court, if any. However, if such a Claim originally brought in small claims court is transferred or removed to a higher state or federal trial court, the Parties reserve their right to request arbitration under this Agreement.

The Parties agree that once one of the Parties has elected to arbitrate, binding arbitration is the exclusive method for resolving any and all Claims. By entering into this Agreement the Parties are waiving their right to a jury trial and their right to bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration. Until a Party entitled to do so requests arbitration under this Agreement, any party to this Agreement may proceed with all other rights and remedies they may have. Neither you nor we waive our right to request arbitration under this Agreement, even after all Parties have elected to litigate a Claim in court, in the event new Claims are asserted after the initial filing of such litigation in court.

The arbitrator shall be an attorney or retired judge. The arbitrator shall apply and be bound by governing local, state or federal law when making an award, and shall award only those damages or other relief allowed by such governing law. Issues regarding whether a matter is arbitrable shall be made by the arbitrator. The arbitrator shall prepare a written decision stating reasoned findings of fact and conclusions of law. A party may seek entry of a judgment on the award in any court of competent jurisdiction.

If you initiate a Claim for Arbitration under this Agreement, we agree to pay that portion of the AAA's initial filing fee which exceeds the lesser of the court filing fee for the state or federal court located in the jurisdiction in which you reside. If we initiate a Claim for arbitration we will pay the entire initial filing fee. We also agree to pay up to $1500 of the arbitrator's fees, unless applicable law or the rules of the AAA require otherwise. Unless applicable law or the rules of the AAA require otherwise, the Parties agree to share equally all other costs and fees, including the arbitrator's fees in excess of $1500. Notwithstanding any other provision of this Agreement, we will also pay any amount of fees or costs that a court or the arbitrator decides we must pay in accordance with applicable law for this Agreement to be enforceable. The arbitrator deciding the Claim(s) shall have the authority to award fees, costs, injunctive or equitable relief in accordance with this Agreement and applicable law. Unless otherwise ordered by the arbitrator in accordance with applicable law or provided otherwise by applicable law law, the Parties shall be responsible for the payment of their own attorney's(') fees.

This Agreement evidences a transaction involving interstate commerce. The Parties acknowledge and agree that the Federal Arbitration Act (9 U.S.C. § 1 *et seq.*) ("FAA") shall govern any arbitration under this Agreement. The arbitrator's decision shall be final and binding, except for any right of appeal provided by the FAA or the rules of the AAA.

If any part of this Agreement shall be deemed or found unenforceable for any reason, the remainder of the Agreement shall remain enforceable. In the event this Agreement is found void you and we waive our respective rights to a trial by jury, if such waiver is permitted by applicable law.

This Agreement shall survive the repayment of all amounts owed by you with respect to the Vehicle. This Agreement is incorporated into and made a part of all Contract(s) as defined in this Agreement. If there is a separate arbitration agreement in any other Contract, then to the extent this Agreement is inconsistent with any such arbitration agreement this Agreement shall supersede such other arbitration agreement with respect to Claims between you and us, unless otherwise provided by law.

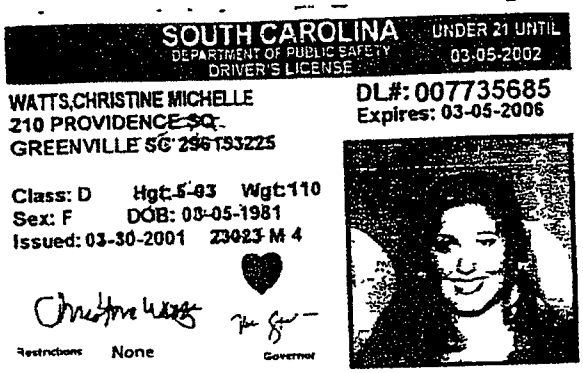
- EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT.
- IF A DISPUTE IS ARBITRATED, YOU AND WE WILL EACH GIVE UP OUR RIGHT TO A TRIAL BY THE COURT OR BY A JURY.
- IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR A CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US, INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.
- THE INFORMATION YOU AND WE MAY OBTAIN IN DISCOVERY FROM EACH OTHER IN ARBITRATION IS GENERALLY MORE LIMITED THAN IN A LAWSUIT.
- OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.
- YOUR AND OUR RIGHTS TO APPEAL OR CHANGE AN ARBITRATION AWARD IN COURT ARE VERY LIMITED.

BY SIGNING BELOW, THE PARTIES ACKNOWLEDGE THAT THEY HAVE READ AND AGREE TO THE TERMS OF THIS ARBITRATION AGREEMENT

Customer: _____ Dealer _____

Customer: _____ Its _____

02033



SOUTH CAROLINA
DEPARTMENT OF PUBLIC SAFETY
DRIVER'S LICENSE

UNDER 21 UNTIL
03-05-2002

WATTS,CHRISTINE MICHELLE
210 PROVIDENCE SQ
GREENVILLE SC 296133225

DL#: 007735685
Expires: 03-05-2006

Class: D Hgt: 5-03 Wgt: 110
Sex: F DOB: 03-05-1981
Issued: 03-30-2001 Z3023 M 4

Restrictions None

Governor

EXHIBIT
tabbies
E

04015

DEALERSHIP NAME CENTARY **PRIVACY NOTICE**

In accordance with federal regulations, we are giving you this notice to tell you how we may use non-public personal information ("Private Information") about you. This notice applies to both current and former customers of the dealership referenced above.

Collection and Use of Private Information

We collect Private Information about you from the following sources:

- Information we receive from you, such as information on applications or other forms, which may include your name, address, social security number and income
- Information about your transactions with us, our affiliates, or others, such as your account balance and payment history
- Information we receive from consumer reporting agencies, such as your credit history and creditworthiness.

Disclosure of Private Information

We may disclose Private Information (described above) under the following circumstances:

1) **To Market Service Providers**
We may disclose all Private Information to companies that perform marketing services for us or to other financial institutions with which we may enter into joint marketing agreements. We may make such disclosures about you as a consumer, customer, or former customer

2) **Among Affiliates**
Some of the Private Information described above may consist of information about your history of dealing with us or Affiliates, such as identification information, account history and balances and payment history (which we refer to as "Transaction Information"). We may share Private Information that consists of Transaction Information with our Affiliates. Our Affiliates include other automotive dealerships and financial companies. We do this to provide you with the products and services we and our Affiliates offer.

3) **With Other Third Parties**
In addition, we may share all Private Information about you as a consumer, customer, or former customer with other non-affiliated third parties, as permitted by law.

Protection of Information
We restrict access to non-public personal information about you to our employees who need this information to provide financial products or services to you. We will strive to maintain physical, electronic, and procedural safeguards that are consistent with federal standards to guard your Private Information.

CUSTOMER ACKNOWLEDGEMENT: I (we) acknowledge that I (we) received a copy of this notice on the date indicated below.

Michael Watts
Customer's Signature

06/25/05
Date

Michael M Watts
Customer's Name (printed)

Christine Watts
Co-customer's signature

06/25/05
Date

Christine Watts
Co-customer's Name (printed)

EXHIBIT F
tabbies

03995

CBM0000

Century BMW

Menu of Investment Enhancements

03996

WATTS

CLIENT: 0

DATE: 6/25/2005

☐ PLATINUM	☐ GOLD	☐ SILVER	☐ BRONZE

☐ **Vehicle Service Contract** CPO
72 Months or 100000 Miles
*Protects you from costly mechanical repairs
*Rental car coverage, *Towing
*Nationwide coverage

☐ **Tire and Wheel Guarantee** $499
*Flat tire replacement
*Insures your tires and wheels against road hazard damage
*24 Hour roadside assistance
*5 year Warranty

☐ **Ding Shield**
○ $494
○ $519
○ $544
*Prepaid paint less dent repair
*Flexible 3,4, or 5 yr. Terms
*Repairs cover up to baseball size dents and dings

☐ **TINT** $279
*Keeps vehicle cooler
*Protects interior and passenger from harmful UV rays
*3M product with a Lifetime Warranty

☐ **Upgraded Maintenance** ~~$1595~~ $1395
*Extends BMW Scheduled Maintenance from 4yrs, 50,000miles to 6yrs, 100,000
*Includes brakes and rotors

☐ ***Resistall* Exterior and Interior Protection Plan** $559
*Protects your vehicle's paint against weather induced fading, loss of gloss, bird droppings, tree sap, acid rain, etc.
*Protects your interior against permanent staining from food, drink, and oil based stains
*5 year Warranty

☐ **Safe Lease** $750
*Wear and Tear Protection for leased vehicles
*Covers paint damage, light lenses, and upholstery up to $5,000
*See agreement for details

☐ **Etch Pro** $199
*Pays up to $2500 if vehicle is stolen and not recovered
*Pays up to $1000 for partial loss deductible reimbursement

☐ **Invisi-Shield** $576
*A deterrence against stone chips bugs, and road debris
*Lifetime warranty against yellowing, peeling, fading, and cracking
*3M Product, computer laser cut specifically for your vehicle

☐ **Easy Care Gap** (Cash Only) $499
*Pays due to theft or collision if a total loss
*Benefit is up to 150% of MSRP or NADA value
*Pays the difference between loan payoff and insurance settlement

Total Products Purchased $ -
☐ Loan ☐ Lease ☐ Cash
60 Payments of $ -
Additional Upfront $ -

All products are optional. I understand I am not required to purchase products to obtain financing. The dealer makes no additional warranties, whether expressed or implied. I understand that I must qualify to secure financing, and such sales are subject to approval from financial institution. I understand that all payments are estimates. This form does supercede or replace the Retail Loan or Lease Contract. Insurance premiums are regulated by state law. The products shaded are the ones I have chosen to purchase.

Client Signature

Declined Coverage

Client Signature

- 598 -

AFFIDAVIT & NOTIFICATION OF
SALE OF MOTOR VEHICLE
(Entire Form Must Be Typed or Printed)

No.30533158

Personally appeared before me CENTURY BMW (Seller) (Dealer Retail Tax #)

2750 LAURENS ROAD GREENVILLE, SC 29607
(Address)

who being duly sworn, deposes and says that on the 25 day of JUN Yr. 05,

he sold the following motor vehicle: Make BMW Model Z4(2.5)

Year 04 Identification (Serial) No. 4USBT33554LS50759

License No. _____ to MICHAEL MILTON WATTS & CHRISTINE MICHELLE WATT
(Buyer)

210 PROVIDENCE SQUARE GREENVILLE GREENVILLE SC 29615
(Street) (City) (County) (State) (Zip)

Special Mailing Address

Deponent further states that there are no liens or encumbrances on the said vehicle except as listed below:

Lienholder CAROLINA COLLEGIATE CU Amount _____

Address P.O. Box 12309 COLUMBIA SC 29211 Date 25 JUN 2005

I certify that the odometer now reads 15514 (no tenths) miles and to the best of my knowledge that it reflects the actual mileage of the vehicle described below, unless one of the following statements is checked.

☐ (1) I hereby certify that to the best of my knowledge, the odometer reading reflects the amount of mileage in excess of its mechanical limits.

☐ (2) I hereby certify that the odometer reading is NOT the actual mileage. WARNING - ODOMETER DISCREPANCY

Federal law (and State law, if applicable) requires that you state the mileage upon transfer of ownership. Failure to complete or providing a false statement may result in fines and/or imprisonment.

(Signature of Seller)

CORY JAMES / CENTURY BMW
(Print Seller's Name)

Michael Watts Christy Watts
(Signature of Buyer)

Michael M. Watts Christine Watts
(Print Buyer's Name)

Property Tax Section
Check One:

X Purchase License Plate

D. L. Number _____

License Plate Issued _____

_____ Transfer License Plate

Christine Watts
Signature of Buyer/if purchasing plates

03999 CBM000005

...LER WITH TITLE AND LICENSING APPLICATION. YELLOW COPY - FOR DEALER'S FILE.

AGREEMENT TO PROVIDE ACCIDENTAL PHYSICAL DAMAGE INSURANCE

o provide protection against serious financial loss should an accident or damage occur, I understand that my instalment contract requires the vehicle be continuously covered with insurance against the risks of fire, theft and collision, and that failure to provide such insurance s lien holder the right to declare the entire unpaid balance immediately due and payable. Accordingly, I have arranged for the required nsurance through the insurance company shown below and have requested that the policy contains a loss payable endorsement in favor of:

Lienholder:

NAMED INSURED:	FIRST: MICHAEL	MIDDLE: M	LAST: WATTS	
ADDRESS	NUMBER / STREET: 210 PROVIDENCE SQ	CITY: GREENVILLE	STATE: SC	ZIP CODE: 29615
TEL. NO.	( ) (864)213-8498	DRIVERS LICENSE #: 0		

NAMED PURCHASER:	FIRST: MICHAEL MILTON	MIDDLE:	LAST: WATTS	
ADDRESS	NUMBER / STREET: 210 PROVIDENCE SQUARE	CITY: GREENVILLE	STATE: SC	ZIP CODE: 29615
TEL. NO.	( ) (864)213-8498			

VEHICLE INSURED:

YEAR	MAKE	BODY	MODEL	VEHICLE IDENTIFICATION NUMBER
2004	BMW	CV	Z4(2.5)	4USBT33554LS50759

VEHICLE USE. ☐ Private Passenger, ☐ Commercial Auto and Trailer

Radius of Haul _____, ☐ Public Livery, ☐ All Other

INSURANCE AGENT *PLEASE PRINT CLEARLY FULL AND EXACT ADDRESS TO APPEAR IN WINDOW ENVELOPE*

NAME	LARRY DIBIASE		
NUMBER AND STREET			
CITY		STATE	ZIP CODE
AGENT'S TELEPHONE NUMBER	( ) 8034324545		

INSURANCE CARRIER

NAME	STATE FARM		
POLICY NUMBER	1050595A1040A		
EFFECTIVE DATE	From: 06/01/05	To:	01/10/
	COVERAGE		

XX ☐ Collision $ 500.00 Deductible

Type. ☐ BROAD FORM OR STANDARD ☐ LIMITED (NOT ACCEPTABLE)

☐ Comprehensive $ _____ Deductible

☐ Fire-Theft

AGENTS COMMENT

NAMED INSURED SIGNS [signature] 06/25/05 DATE

DEALER CONFIRMATION:

NAME OF PERSON CONTACTED: TINA

( ) AGENCY ( ) INSURANCE CARRIER

Confirmed By TAYLOR DATE 6/27/05

DEALER SIGNS [signature] - 600 -

DEALER CENTURY BMW 04002

CRM000005

FULL DISCLOSURE CUSTOMER WORKSHEET

Buyer Michael WATTS
Address
City
State Zip
E-Mail

New ☐ Used ☐

Stock #
Year
Make
Model
Miles
Vin #

Date 6/25/05
Sales Person ELIZABETH COURTNEY
Home Phone 864-213-8498
Work Phone
Mobile #

Trade Information

Year
Make
Model
Miles
Color
Vin #
Payoff

	Selling Price	Trade
MSRP	$31,375.00	$
Destination	+44	
Subtotal	32,000.50	
Additional Equipment		

ARBITRATION AGREEMENT

(All States Except CA)

VIN: 4U5BT33554L550759

DATE: 6.25.05

In this Arbitration Agreement ("Agreement"), "you" and "your" refers to the customer(s) who sign(s) below. "We", "us", and Dealer refer to the Dealer signing below, and includes the Dealer's employees, agents, and parent and affiliated companies (including, but not limited to, Cornerstone Acceptance Corporation) and their employees and agents. "Parties" refers to you and us. "Vehicle" refers to the automobile identified by the VIN set forth above. "Claim(s)" includes any and all disputes, claims or controversies between the Parties relating to the Vehicle or arising out of or relating to: (a) the application for and the terms of and enforceability of the sale, lease, or financing of the Vehicle, (b) the purchase or terms of any warranty, service agreement, maintenance plan, paint/undercarriage/interior protection product, anti-theft etching product and warranty, GAP protection, deficiency waiver addendum, or any or other product or insurance, (c) any claims of breach of contract, negligence, misrepresentation, conversion, fraud, or unfair and deceptive trade practices, (d) any claim of a violation of any state or federal statute or regulation, or (e) the Vehicle's condition, warranty, workmanship, servicing, maintenance or repair. All Claims must be brought within the time allowed by the applicable statute(s) of limitation. "Contract(s)" refers to any agreement(s) between you and us regarding the sale, lease, financing, service or maintenance of the Vehicle.

Upon the request of a Party, any and all Claim(s) shall be decided in binding arbitration before the American Arbitration Association (1-800-778-7879/www.adr.org) ("AAA"). The Parties may mutually agree to use another arbitration forum and/or qualified arbitrator. Unless mutually agreed otherwise between the Parties, any arbitration under this Agreement shall be conducted under the commercial arbitration rules of the AAA. To the extent that any Claim is deemed a "consumer dispute", the Parties agree that the fee schedule provided in the rules for consumer disputes of the AAA, if any, will apply. You can get a copy of the rules from the AAA. The arbitration hearing shall be conducted, at your option, in the federal district in which you reside or in which the Vehicle was purchased or leased.

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If you initiate a Claim for Arbitration under this Agreement, we agree to pay that portion of the AAA's initial filing fee which exceeds the lesser of the court filing fee for the state or federal court located in the jurisdiction in which you reside. If we initiate a Claim for arbitration we will pay the entire initial filing fee. We also agree to pay up to $1500 of the arbitrator's fees, unless applicable law or the rules of the AAA require otherwise. Unless applicable law or the rules of the AAA require otherwise, the Parties agree to share equally all other costs and fees, including the arbitrator's fees in excess of $1500. Notwithstanding any other provision of this Agreement, we will also pay any amount of fees or costs that a court or the arbitrator decides we must pay in accordance with applicable law for this

06 /25 / 2005
Date of Sale

WE OWE
ADDITION AND REMOVAL ORDER

Customer's Name	Home Phone #	Work Phone #	VIN #	
MICHAEL MILTON WATTS	(864)213-8498	(864)270-7395	4USBT33554LS50759	
Address 210 PROVIDENCE SQUARE GREENVILLE SC 29615	Model of Car Z4(2.5)	License #	Stock # LP6771	Salesperson COURTNEY,EL	Sales Mgr. NOVAK,JEF

PRESENT THIS DOCUMENT AT TIME OF SERVICE

	Add	Remove	DESCRIPTION	COMPLETED
Alarm	☐	☐	GREAT CENTURY SERVICE	
Stereo/Cass./CD	☐	☐		
Air Conditioner	☐	☐		
Paint Sealant	☐	☐		
Fabric Protection	☐	☐		
_____	☐	☐		
_____	☐	☐		
_____	☐	☐		
_____	☐	☐		
_____	☐	☐		
_____	☐	☐		
_____	☐	☐		

AUTHORIZED BY _____ INITIAL EACH ITEM

WHITE COPY
Service Department should get immediately and file alphabetically by customer name
YELLOW COPY
Attach to buyer's order for transmittal to General Office for filing in Deal Envelope, or in hold for action file if removal is indicated.
PINK COPY
Attach to buyer's order for transmittal to General Office for permanent file.
GOLDENROD COPY
To be given to the customer for presentation to have work performed. NOTE customer must present copy before work will be done.

Buyer hereby agrees that the above additions and removals are in accordance with the agreement entered into for purchase of the specific vehicle referred to and that he has not purchased or been promised equipment other than listed for future installation. Buyer will bring said vehicle to dealership, upon request, for removals listed; otherwise buyer may be charged for list price of items listed for removal.

X _____
Buyer's Signature

04010

VOID AFTER 30 DAYS FROM DATE OF SALE

06 / 25 / 2005
Date of Sale

WE OWE
ADDITION AND REMOVAL ORDER

Customer's Name	Home Phone #	Work Phone #	VIN #	
MICHAEL MILTON WATTS	(864)213-8498	(864)270-7396	4US8T33554LS50759	
Address 210 PROVIDENCE SQUARE GREENVILLE SC 29615	Model of Car Z4(2.5)	License #	Stock # LP6771	Salesperson COURTNEY,EL	Sales Mgr. NOVAK,JEF

PRESENT THIS DOCUMENT AT TIME OF SERVICE

	Add	Remove	DESCRIPTION	COMPLETED
Alarm	☐	☐	GREAT CENTURY SERVICE	
Stereo/Cass./CD	☐	☐		
Air Conditioner	☐	☐		
Paint Sealant	☐	☐		
Fabric Protection	☐	☐		
_____	☐	☐		
_____	☐	☐		
_____	☐	☐		
_____	☐	☐		
_____	☐	☐		
_____	☐	☐		
_____	☐	☐		

AUTHORIZED BY _____ INITIAL EACH ITEM

WHITE COPY
Service Department should get immediately and file alphabetically by customer name
YELLOW COPY
Attach to buyer's order for transmittal to General Office for filing in Deal Envelope, or in hold for action file if removal is indicated.
PINK COPY
Attach to buyer's order for transmittal to General Office for permanent file.
GOLDENROD COPY
To be given to the customer for presentation to have work performed. NOTE customer ust present copy before work will be done.

Buyer hereby agrees that the above additions and removals are in accordance with the agreement entered into for purchase of the specific vehicle referred to and that he has not purchased or been promised equipment other than listed for future installation. Buyer will bring said vehicle to dealership, upon request, for removals listed; otherwise buyer may be charged for list price of items listed for removal.

X _____
Buyer's Signature

04011

VOID AFTER 30 DAYS FROM DATE OF SALE

CENTURY BMW
CENTURY MINI

2750 LAURENS ROAD • GREENVILLE, SC 29607
PHONE (864) 234-6437
www.century-bmw.com • www.centurymini.com

RETAIL BUYER'S ORDER

Date 6-25-05 Stock No. LP6777 - [illegible]

Salesperson Elizabeth Courtney

Name Michael M Watts or Christine M. Watts Spouse

Street 210 Providence Sq. Phone 864-213-8498

City Greenville State SC Zip 29615 County

Employer Phone 864-270-7396

E-mail Address

PURCHASE

☐ NEW ☐ DEMO
☐ PRE-OWNED ☐ FACTORY CAR

Year 04 Make BMW Body Type Series 24

Cylinders Serial No. 4USBT33554LS50759 COLOR: Exterior GRAY / Interior

OPTIONS:
☐ PREMIUM PACKAGE
☐ SPORTS PREMIUM PACKAGE
☐ SPORTS PACKAGE
☐ COLD WEATHER PACKAGE
☐ ACTIVITY PACKAGE
☐ CONVENIENCE PACKAGE
☐ MOON ROOF
☐ LEATHER UPHOLS.
☐ PREMIUM SOUND
☐ IN DASH CD
☐ CD CHANGER
☐ HEATED SEATS
☐ ON BOARD COMPUTER
☐ ALLOY WHEELS
☐ CRUISE CONTROL
ENGINE: ☐ _____
TRANSMISSION: ☐ AUTOMATIC ☐ MANUAL

TRADE

Mileage 15514

Year Make Body Type Series

Cylinders Serial No. COLOR: Exterior / Interior

Mileage Options

BALANCE OWED TO: Name & Address:

ne Contact

Account #

Effective Dates

INSURANCE INFORMATION Company Name State Farm

Agent Larry Dibiase Phone 803-432-4545

LIEN: Name & Address:
Carolina Collegit Credit Union
P.O Box 12309
Columbia, SC 29211

Phone 803 ~~251-8424~~ Contact Stephanie Hugley

Account # 227-5555

Effective Dates

Policy # 1050595A1040A Effective Dates

Drivers License #

Remarks

PRICE: (Including Transportation & Service Charges)	32,980
Additional Options:	$1,604.50
TOTAL:	31,375.5
Allowance on Trade-in	
Cash Difference	
SC Sales Tax	300
Balance Owed on Trade-in	
Title and License ☐ New ☑ Trans ☐ Temp	25
Recording & Processing Fees	$299.50
TOTAL:	32,000
Service Agreement	
Insurance	
TOTAL:	
Cash on Delivery	
BALANCE DUE:	32,000

READ CAREFULLY: Century BMW / Century Mini agrees to sell and the Buyer(s) agree to purchase the vehicle as above described at the price set forth The Buyer shall remit full payment of the entire balance due on or before _____. This Buyer's Order constitutes the entire agreement between the parties and may not be changed except by an instrument in writing signed by the party to be charged.

CENTURY BMW CENTURY MINI

Must be accepted by an Officer of the Company

Buyer X Co-Buyer

☐ **USED CAR CONTRACTUAL DISCLOSURE STATEMENT:** - "The information you see on the window form (Buyer's Guide) for this vehicle is part of the contract. Information on the window form overrides any contrary provisions in the contract of sale."

04019

Purchaser's Signature X _____

☐ **NEW VEHICLE DISCLAIMER OF WARRANTIES:** - I have read, understand and accept all provisions of the Manufacturer's Warranty Statement [illegible] chasing. Furthermore, I understand that all warranties on this vehicle are those of the manufacturers. The seller, Century BMW / Century Mini, hereby expressly disclaims warranties, either expressed or implied, including any implied warranty of merchantability or fitness for a particular purpose and Century BMW / Century Mini, neither assum nor authorizes any person to assume for it any liability in connection with the sale of this vehicle. This disclaimer in no way affects the provisions of the manufacturer's warr ties.

Purchaser's Signature X _____

This agreement between the undersigned buyer(s) and dealer is incorporated by reference into and is made a part of any separate retail installment or credit sale agreement betw the undersigned buyer(s) and dealer ("Retail Financing Agreement") Notwithstanding anything to the contrary in any other document, if there is a Retail Financing Agreement the dersigned buyer(s) understand and agree that the transaction evidenced by this agreement and the Retail Financing Agreement is contingent upon credit approval by, and assignm of the Retail Financing Agreement to, a third-party financial institution. If the Retail Financing Agreement is not accepted by a third-party financial institution, you must immediately re agreement and the entire transaction evidenced by this agreement and the Retail Financing Agreement and this agreement shall be null and void.

BMW Financial Services
Lease-End Inspection Form

Inspecting Center Name Century BMW 21470

1. Customer Information

Scansource Inc — Account Number 3000374937

Model Z4 roadster 2.5 — Year 2004 — VIN 4USBT33554LS50759 — Maturity Date May 28, 2005

New X Pre-Owned ____ — Related Automotive Finance Product Y____ N____

2. Body Assessment – Charges for Dings, Dents and Scratches (See diagram on back.)

	Small	Large	Total		Small	Large	Total
Front Bumper			$	Rear Bumper			$
Front Hood and Grill			$	Right Quarter Panel			$
Left Front Fender			$	Right Rear Door			$
Left Front Door			$	Right Front Door			$
Left Rear Door			$	Right Front Fender			$
Left Quarter Panel			$	Roof			$
Deck Lid			$			Body Assessment Total	$

- Charge per incident: Small = $150 Large = $450
- Maximum charged per panel for New Vehicles (small and large dings, dents and scratches combined) is $600.
- If vehicle is pre-owned, then Total Body Assessment is 80% of New Vehicle amount assessed.

3. Parts Charges

Yes	No		Subtotal Parts Chg.
☐	☐	Tires: Five tires with minimum 4/32" (1/8") tread depth measured from lowest depth not on the wear bar (including spare)? If no: see chart on page 2	
☐	☐	Rims: Five rims free of cracks and structural bends (including spare)? If no: see chart on page 2	
☐	☐	Windshield free of cracks or stars within wiper sweep and those greater than 1/4" outside wipers sweep? If no: Standard = $300 Rain Sensor = $600	
☐	☐	Fog lamps/lenses free of breaks or cracks? If no: $120 per occasion (max 2)	
☐	☐	Taillamps/lenses free of breaks or cracks? If no: $150 per occasion (max 4)	
☐	☐	Factory CD changer in vehicle? If no: CD changer = $300	
☐	☐	Minimum 2 master keys? If no: $100 per master key	
☐	☐	Scheduled Maintenance Performed? If no and vehicle is not covered under a BMW Maintenance Program, then $150.	

Parts Total: $

4. Excess Mileage Charge (Completed at time of turn-in.)

A. Current miles 1

B. Miles at inception (from contract) 15000

C. Miles driven (A. minus B.) .....

D. Contracted mileage .....

E. Excess miles (C. minus D.) (If negative, then no charge) .....

Total Excess Mileage Charge (E. x $ .20): ..... $

Has the vehicle sustained major damage? By marking "Yes", the customer acknowledges that prior significant repairs have been made to the body/frame of this vehicle. (Significant means either prior accident repairs in which any panels were replaced OR any damage that required the painting of two or more body panels.) Yes____ No____

5. Summary of Excess Wear and Use and Mileage Charges*

* Other fees may apply (e.g., property tax, unpaid tickets, etc.). Per your Lease Agreement, lease-end charges may be subject to local and state taxes.

Body Assessment Total .....

Parts Total .....

Total Excess Mileage Charge .....

Disposition Fee** $350.00

Loyalty Reward for Unused Miles .....
(eligibility restrictions apply)

Grand Total .....

** The Disposition Fee is a charge included on your Lease Agreement, which is used to defray the cost of preparing and selling the vehicle at the end of the lease (either scheduled or early termination) if the vehicle is returned. It is not due if you purchase the vehicle. As a courtesy to our returning customers, this fee will be credited to your next account if you finance with BMW Financial Services within six (6) months.

Any vehicle with accident damage involving dents, dings or scratches greater than eight (8) inches, any misaligned or broken components, any major mechanical problem, improper repairs, hail damage or a badly damaged interior (multiple burns, rips, or water damage) voids this form. In this case, an independent inspection company must evaluate your vehicle. The inspection form must reflect the condition of the vehicle at turn-in. If turn-in condition is significantly different, a re-inspection/reassessment is required. **Both signatures are required for validation. If it is determined that significant prior repairs have been made, the amount of the loyalty benefit from BMW FS will be charged back to the customer.**

Customer_____ Inspector 3rd Party Date_____

6. Federal Odometer Disclosure Statement (Completed at time of turn-in.)

Federal Law requires that you disclose mileage to the Lessor at this time. Failure to comply with this requirement or making an inaccurate or untruthful statement may make liable for civil or criminal penalties, pursuant to the Motor Vehicle Information and Cost Savings Act of 1972 (Pub L. 92-513 as amended by Pub L 99-579).

Vehicle ID Number 4USBT33554LS50759 — Account Number 3000374937 04020

Year: 2004 — Make: BMW — Model: Z4 roadster 2.5

I, _____, state the ODOMETER on the vehicle described above reads _____ miles (no tenth

Check one of the following statements:

☐ To the best of my knowledge, the ODOMETER reading reflects ACTUAL VEHICLE MILEAGE.

607

☐ THE ODOMETER reading is NOT THE ACTUAL VEHICLE MILEAGE

SECTION 6 - SATISFACTION OF LIEN

SATISFACTION OF FIRST LIEN
THIS IS TO CERTIFY THAT THE LIEN AGAINST THE VEHICLE HAS BEEN FULLY SATISFIED ON:

DATE _____

NAME OF LIEN HOLDER _____

CERTIFIED BY _____

TITLE _____

SATISFACTION OF SECOND LIEN
THIS IS TO CERTIFY THAT THE LIEN AGAINST THE VEHICLE HAS BEEN FULLY SATISFIED ON:

DATE _____

NAME OF LIEN HOLDER _____

CERTIFIED BY _____

TITLE _____

SECTION 7 - SALES TAX EXEMPTION

Complete this section if you are entitled to a sales tax exemption.

VEHICLE PURCHASED FROM INDIVIDUALS AND TITLED IN SOUTH CAROLINA ARE SUBJECT TO SALES TAX UNLESS EXEMPT THE TAX IS 5% OF THE SALES PRICE UP TO A MAXIMUM OF $300.00 (MOBILE HOMES ARE CALCULATED DIFFERENTLY.)

☐ THE VEHICLE WAS TRANSFERRED FROM ○ MY PARENT ○ MY SPOUSE ○ MY CHILD ○ MY BROTHER/SISTER ○ MY GRANDPARENT ○ MY GRANDCHILD

☐ THE VEHICLE WAS TRANSFERRED TO ME AS ○ LEGAL HEIR ○ BENEFICIARY ○ DISTRIBUTEE

☐ I AM NON-RESIDENT MILITARY PERSONNEL ☐ THE VEHICLE WAS A BONAFIDE GIFT

SECTION 8 - ADDITIONAL INFORMATION

DATE OF PURCHASE	DATE FIRST OPERATED IN S.C.	ENERGY EFFICIENT MANUFACTURED/MOBILE HOME?
06/25/05	6/25/2005	☐ YES ☐ NO

NEW OR USED?	PRIOR TITLE NUMBER	PRIOR TITLE STATE
USED	4707601337885 53A	SC

THE VEHICLE DESCRIBED ON THIS APPLICATION IS ☐ REBUILDABLE ☐ NON-REBUILDABLE

THE VEHICLE SUSTAINED THE FOLLOWING DAMAGE ☐ COLLISION ☐ FIRE ☐ WATER ☐ STOLEN (RECOVERED) ☐ STOLEN (UNRECOVERED)

AGENCY REFERENCE NUMBER

SALVAGE% _____

Calculate the Salvage Percentage: Predamaged Value _____ Estimate for Repairs _____ Percentage _____

SECTION 9 - SELLER INFORMATION

SELLER OR DEALER NAME	SC DEALER/WHOLESALER NUMBER	SC SALES TAX NUMBER	SALES PRICE
CENTURY BMW	30219	023-6684-89	31375.50

ADDRESS	CITY	STATE	ZIP CODE
2750 LAURENS ROAD	GREENVILLE	SC	29607

SECTION 10 - INSURANCE CERTIFICATION

A VEHICLE MUST BE INSURED WITH LIABILITY INSURANCE COVERAGE WHEN IT IS REGISTERED AND IT MUST REMAIN INSURED WHILE REGISTERED, WHETHER OR NOT IT IS OPERATED, OR THE UNINSURED MOTORIST FEE MUST BE PAID. PENALTIES ARE SEVERE FOR VIOLATION OF THIS REQUIREMENT.

UNDER PENALTIES OF PERJURY, I (WE) DECLARE THAT THIS VEHICLE IS INSURED BY A LIABILITY INSURANCE POLICY ISSUED THROUGH AN INSURANCE COMPANY LICENSED TO DO BUSINESS IN SOUTH CAROLINA AND IT WILL REMAIN INSURED THROUGHOUT THE REGISTRATION PERIOD

NAME OF INSURANCE COMPANY STATE FARM

SECTION 11 - GIFT OF LIFE TRUST FUND

DO YOU WISH TO DONATE AN ADDITIONAL $1.00 OR MORE TO THE GIFT OF LIFE TRUST FUND? ☐ YES ☐ NO AMOUNT $ _____

SECTION 12 - SIGNATURE OF OWNER

UNDER PENALTIES OF PERJURY, I DECLARE THAT I AM THE OWNER OF THIS VEHICLE AND REQUEST THAT A SOUTH CAROLINA CERTIFICATE OF TITLE AND/OR REGISTRATION BE ISSUED I FURTHER CERTIFY THAT THE INFORMATION ON THIS APPLICATION IS CORRECT TO THE BEST OF MY KNOWLEDGE. THE VEHICLE IS SUBJECT TO THE LIENS NAMED AND NO OTHERS.

Martha J Walter Martha J Walter 06/25/05

SIGNATURE OF OWNER (S) - MUST BE SIGNED IN INK BY OWNER OR AUTHORIZED AGENT (ATTACH POWER OF ATTORNEY IF APPLICABLE) DATE

DISCLOSURE STATEMENT

56-3-240 (SOUTH CAROLINA CODE OF LAWS) - THE DEPARTMENT SHALL OBTAIN THE FEDERAL EMPLOYER IDENTIFICATION NUMBER OR SOCIAL SECURITY NUMBER WHEN A VEHICLE IS REGISTERED WITH A GROSS VEHICLE WEIGHT OF MORE THAN 26,000 POUNDS OR A BUS COMMON CARRIER. THE DRIVER'S PRIVACY PROTECTION ACT OF 1994 (DPPA), 18 USC SECTION 2721-2725 RESTRICT THE DISCLOSURE OF PERSONAL INFORMATION CONTAINED IN OUR RECORDS.

PENALTY FEES

FAILURE TO REGISTER WITHIN 45 DAYS OF THE DATE OF PURCHASE WILL RESULT IN PENALTY FEES IN ADDITION TO REGULAR TITLE AND/OR REGISTRATION FEES. THE LATE PENALTY FEE SCHEDULE IS AS FOLLOWS:
46 - 60 DAYS LATE - $10.00 61 - 75 DAYS LATE - $25.00 76 - 135 DAYS LATE - $50.00 OVER 135 DAYS LATE - $75.00

THIS SECTION FOR DMV USE ONLY

STAMP VEHICLE BRANDS 04025

		TRANSACTION FEES		
RATED BY	MG	EXPEDITED FEE	2400	WEIGHT INCR.
OFFICE/OFFICE NUMBER	885 PM	LICENSE FEE		TRANSFER 1500
PLATE NUMBER		UNINSURED FEE		TITLE
EXPIRATION DATE		USE OR SALES TAX	608	GIFT OF LIFE FUND
PLATE CLASS	NP	PENALTY		TOTAL 3900
SUSPENSE REASON				

CENTURYBMW CENTURYMINI

2750 LAURENS ROAD • GREENVILLE, SC 29607
PHONE (864) 234-6437
www.century-bmw.com • www.centurymini.com

RETAIL BUYER'S ORDER

Name: MICHAEL MILTON WATTS | Spouse: CHRISTINE MICHELLE WATTS
Street: 210 PROVIDENCE SQUARE | Phone: (864)213-8498
City: GREENVILLE | State: SC | Zip: 29615 | County: GREENVILLE
Date: 25 JUN 05 | Stock No: EP8771
Employer | Phone: (864)270-7396
Sales: COURTNEY, ELIZABETH | E-mail Address

PURCHASE

☐ NEW ☐ DEMO ☐ PRE-OWNED ☐ FACTORY CAR

Year: 04 | Make: BMW | Body Type: CV | Series: Z4(2.5)
Cylinders | Serial No: 4USBT33554LS50759 | COLOR Exterior: STL/BLK Interior:

OPTIONS:
☐ PREMIUM PACKAGE ☐ SPORTS PREMIUM PACKAGE ☐ SPORTS PACKAGE ☐ COLD WEATHER PACKAGE
☐ ACTIVITY PACKAGE ☐ CONVENIENCE PACKAGE ☐ MOON ROOF ☐ LEATHER UPHOLS
☐ PREMIUM SOUND ☐ IN DASH CD ☐ CD CHANGER ☐ HEATED SEATS
☐ ON BOARD COMPUTER ☐ ALLOY WHEELS ☐ CRUISE CONTROL
ENGINE: ☐ _____
TRANSMISSION: ☐ AUTOMATIC ☐ MANUAL

Mileage: 15514

TRADE

Year | Make | Body Type | Series
Cylinders | Serial No. | COLOR Exterior / Interior
Mileage | Options

BALANCE OWED TO: N.A. | Name & Address:
Contact

LIEN: Name & Address: CAROLINA COLLEGIATE CU P.O. BOX 12309 COLUMBIA SC 29211
Phone: 803.251.8474 | Contact: STEPHANIE

Account # | Effective Dates
Account # | Effective Dates

INSURANCE INFORMATION | Company Name: STATE FARM
Agent: LARRY DIBIASE | Phone: 8054324545
Policy #: 1050595A1040 | Effective Dates: 06/01/05 01/10/06
Drivers License #

Remarks: 24 APR 1956

04036

PRICE: (Including Transportation & Service Charges)	31375.50
Additional Options:	N.A. N.A. N.A.
TOTAL:	31375.50
Allowance on Trade-in	N.A.
Cash Difference	31375.50
SC Sales Tax	300.00
Balance Owed on Trade-in	N.A.
Title and License ☐ New ☐ Trans ☐ Temp	25.00
Recording & Processing Fees	$299.50
TOTAL:	32000.00
########## Service Agreement	N.A.
Insurance	
TOTAL:	32000.00
Cash on Delivery	32000.00
BALANCE DUE:	N.A.

READ CAREFULLY: Century BMW / Century Mini agrees to sell and the Buyer(s) agree to purchase the vehicle as above described at the price set forth. The Buyer shall remit full payment of the entire balance due on or before _____ This Buyer's Order constitutes the entire agreement between the parties and may not be changed except by an instrument in writing signed by the party to be charged.

CENTURYBMW CENTURYMINI

X Michael Watts — Buyer
X Christine Watts — Co-Buyer
Must be accepted by an Officer of the Company

☐ **USED CAR CONTRACTUAL DISCLOSURE STATEMENT:** - "The information you see on the window form (Buyer's Guide) for this vehicle is part of the contract. Information on the window form overrides any contrary provisions in the contract of sale"

Purchaser's Signature X Michael Watts X Christine Watts

☐ **NEW VEHICLE**

DISCLAIMER OF WARRANTIES: - I have read, understand and accept all provisions of the Manufacturer's Warranty Statement covering this new vehicle that I am purchasing. Furthermore, I understand that all warranties on this vehicle are those of the manufacturers. The seller, Century BMW / Century Mini, hereby expressly disclaims all warranties, either expressed or implied, including any implied warranty of merchantability or fitness for a particular purpose and Century BMW / Century Mini, neither assumes nor authorizes any person to assume for it any liability in connection with the sale of this vehicle. This disclaimer in no way affects the provisions of the manufacturer's warranties.

Purchaser's Signature X _____

This agreement between the undersigned buyer(s) and dealer is incorporated by reference into and is made a part of any separate retail installment or credit sale agreement between the undersigned buyer(s) and dealer ("Retail Financing Agreement") Notwithstanding anything to the contrary in any other document, if there is a Retail Financing Agreement the undersigned buyer(s) understand and agree that the transaction evidenced by this agreement and the Retail Financing Agreement is contingent upon credit approval by, and assignment of the Retail Financing Agreement to, a third-party financial institution. If the Retail Financing Agreement is not accepted by a third-party financial institution, you must immediately return the vehicle referred to in this agreement, and the entire transaction evidenced by this agreement and the Retail Financing Agreement and this agreement shall be null and void

Signed: Michael Watts

H
Tillman v Commercial Credit Loans, Inc
N.C.,2008.

Supreme Court of North Carolina.
Fannie Lee TILLMAN and Shirley Richardson, on behalf of themselves and all others similarly situated
v.
COMMERCIAL CREDIT LOANS, INC ; Commercial Credit Corporation; Citigroup, Inc ; Citicorp, Inc.; Citifinancial, Inc.; and Citifinancial Services, Inc.
No. 360A06.

Jan. 25, 2008

Background: Mortgagors asserted a class action lawsuit against mortgagees, alleging that mortgagees acted unlawfully in connection with credit life and disability insurance policies sold with their loans. The Superior Court, Vance County, Ronald L Stephens, J., denied mortgagees' motion to compel arbitration. Mortgagees appealed. The Court of Appeals, 177 N.C.App 568, 629 S.E.2d 865, reversed and remanded. Mortgagors filed an appeal as of right.

Holdings: The Supreme Court, Timmons-Goodson, J., held that

(1) evidence was sufficient to establish that the only realistic way for mortgagors to prosecute their claims was to enter into contingency fee agreements;

(2) evidence was sufficient to establish that the arbitration clause in the loans was a standard-form contract of adhesion;

(3) evidence was sufficient to establish the procedural unconscionability of the arbitration clause; and

(4) evidence was sufficient to establish the substantive unconscionability of the arbitration clause.

Court of Appeals reversed.

Edmunds, J., concurred in the result only, and filed opinion, in which Martin, J., joined.

Newby, J , dissented and filed opinion, in which Parker, C J , joined.

West Headnotes

[1] Appeal and Error 30 ⇐1011.1(4)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1011 On Conflicting Evidence
30k1011 1 In General
30k1011 1(4) k Findings Supported by Evidence. Most Cited Cases
Findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if there is evidence to the contrary.

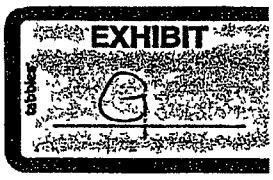
[2] Appeal and Error 30 ⇐893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Conclusions of law drawn by the trial court from its findings of fact are reviewable de novo on appeal

[3] Appeal and Error 30 ⇐893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo

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30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases
Because unconscionability is a question of law, the Supreme Court reviews de novo a trial court's conclusion that a term in a contract is unconscionable. (Per Timmons-Goodson, J., with two justices concurring and two justices concurring in the result.)

[4] Alternative Dispute Resolution 25T ⇐210

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk210 k Evidence. Most Cited Cases
Evidence was sufficient to establish, in hearing on mortgagees' motion to compel arbitration in mortgagors' class action lawsuit alleging that mortgagees acted unlawfully in connection with credit life and disability insurance policies sold with loans, that because of the limited financial resources of mortgagors and other similarly situated borrowers mortgagors could not afford to hire an attorney to represent them on an hourly basis and that the only realistic way for them prosecute their claims was to enter into contingency fee agreements; both named plaintiffs testified they could not afford to hire an attorney on an hourly basis. (Per Timmons-Goodson, J., with two justices concurring and two justices concurring in the result.)

[5] Alternative Dispute Resolution 25T ⇐210

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk210 k. Evidence. Most Cited Cases
Evidence was sufficient to establish, in hearing on mortgagees' motion to compel arbitration in mortgagors' class action lawsuit alleging that mortgagees acted unlawfully in connection with credit life and disability insurance policies sold with loans, that the arbitration clause in the loans was a standard-form contract of adhesion, that borrowers were given no opportunity to negotiate out of the arbitration provision, and that mortgagees would not make a loan if the loan agreement did not include the arbitration provision, mortgagors' general counsel for litigation testified that the mortgagors did not make loans without an arbitration clause (Per Timmons-Goodson, J., with two justices concurring and two justices concurring in the result.)

[6] Alternative Dispute Resolution 25T ⇐210

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk210 k. Evidence. Most Cited Cases
Evidence was sufficient to establish, in hearing on mortgagees' motion to compel arbitration in mortgagors' class action lawsuit alleging that mortgagees acted unlawfully in connection with credit life and disability insurance policies sold with loans, that if mortgagors' claims were arbitrated the arbitrators would charge $500 to $2,380 per day, assistant vice-president of arbitration association testified to the average compensation rates for arbitrators in North Carolina (Per Timmons-Goodson, J., with two justices concurring and two justices concurring in the result.)

[7] Alternative Dispute Resolution 25T ⇐113

25T Alternative Dispute Resolution
25TII Arbitration
25TII(A) Nature and Form of Proceeding
25Tk113 k. Arbitration Favored, Public Policy. Most Cited Cases
Arbitration is favored in North Carolina

[8] Alternative Dispute Resolution 25T ⇐

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655 S.E.2d 362
655 S.E.2d 362
(Cite as: 655 S.E.2d 362)

134(6)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(6) k. Unconscionability Most Cited Cases
Equity may require invalidation of an arbitration agreement that is unconscionable. (Per Timmons-Goodson, J, with two justices concurring and two justices concurring in the result)

[9] Contracts 95 ⇐1

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases
A court will find a contract to be unconscionable only when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other (Per Timmons-Goodson, J, with two justices concurring and two justices concurring in the result.)

[10] Contracts 95 ⇐1

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases
An inquiry into unconscionability of a contract requires that a court consider all the facts and circumstances of a particular case, and if the provisions are then viewed as so one-sided that the contracting party is denied any opportunity for a meaningful choice, the contract should be found unconscionable. (Per Timmons-Goodson, J., with two justices concurring and two justices concurring in the result.)

[11] Contracts 95 ⇐1

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k Nature and Grounds of Contractual Obligation. Most Cited Cases

Contracts 95 ⇐328(1)

95 Contracts
95VI Actions for Breach
95k328 Defenses
95k328(1) k In General. Most Cited Cases
Unconscionability is an affirmative defense, and the party asserting it has the burden of proof. (Per Timmons-Goodson, J., with two justices concurring and two justices concurring in the result.)

[12] Contracts 95 ⇐1

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation Most Cited Cases
A party asserting that a contract is unconscionable must prove both procedural and substantive unconscionability. (Per Timmons-Goodson, J, with two justices concurring and two justices concurring in the result)

[13] Contracts 95 ⇐1

95 Contracts
95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation. Most Cited Cases
Unconscionability is ultimately a determination to be made in light of a variety of factors not unifiable into a formula. (Per Timmons-Goodson, J., with two justices concurring and two justices concurring in the result.)

[14] Contracts 95 ⇐1

95 Contracts

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95I Requisites and Validity
95I(A) Nature and Essentials in General
95k1 k. Nature and Grounds of Contractual Obligation Most Cited Cases
While the presence of both procedural and substantive problems is necessary for an ultimate finding of unconscionability, such a finding may be appropriate when a contract presents pronounced substantive unfairness and a minimal degree of procedural unfairness, or vice versa. (Per Timmons-Goodson, J, with two justices concurring and two justices concurring in the result.)

[15] Alternative Dispute Resolution 25T ⇐210

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk210 k. Evidence Most Cited Cases
Evidence was sufficient to establish procedural unconscionability of arbitration clause, in hearing on mortgagees' motion to compel arbitration in mortgagors' class action lawsuit alleging mortgagees acted unlawfully in connection with credit life and disability insurance policies sold with loans; named plaintiffs testified that they were rushed through loan closings and that there was no mention of credit insurance or the arbitration clause, mortgagees admitted that they would have refused to make the loans rather than negotiate the terms of the arbitration agreement, and there was evidence that bargaining power was unequal in that plaintiffs were relatively unsophisticated consumers contracting with corporate defendants who drafted the arbitration clause and included it as boilerplate language in all of their loan agreements. (Per Timmons-Goodson, J., with two justices concurring and two justices concurring in the result)

[16] Alternative Dispute Resolution 25T ⇐210

25T Alternative Dispute Resolution
25TII Arbitration
25TII(D) Performance, Breach, Enforcement, and Contest
25Tk204 Remedies and Proceedings for Enforcement in General
25Tk210 k. Evidence Most Cited Cases
Evidence was sufficient to establish substantive unconscionability of arbitration clause, in hearing on mortgagees' motion to compel arbitration in mortgagors' class action alleging mortgagees acted unlawfully in connection with credit and disability insurance policies sold with loans, mortgagees had exempted collection actions from arbitration, under the clause the loser paid arbitrator's fee if arbitration last over 8 hours, clause prohibited joinder of claims and class actions, and there was evidence that the named plaintiffs lived from paycheck to paycheck, that the only realistic way for plaintiffs and similarly situated class members to afford to dispute the insurance payments was to enter into contingency agreements in a class action, and that no arbitrations had been brought under the clause that mortgagees had included in over 68,000 loan agreements. (Per Timmons-Goodson, J., with two justices concurring and two justices concurring in the result)

[17] Alternative Dispute Resolution 25T ⇐ 134(6)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(6) k Unconscionability. Most Cited Cases
When determining whether an arbitration agreement in a consumer contract is unconscionable, because the underlying concern is whether individuals, upon reading an arbitration agreement, will be deterred from bringing a claim, courts must consider the agreement as drafted. (Per Timmons-Goodson, J, with two justices concurring and two justices concurring in the result)

[18] Alternative Dispute Resolution 25T ⇐

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655 S E 2d 362
655 S E 2d 362
(Cite as: 655 S.E.2d 362)

134(6)

25T Alternative Dispute Resolution
25TII Arbitration
25TII(B) Agreements to Arbitrate
25Tk131 Requisites and Validity
25Tk134 Validity
25Tk134(6) k. Unconscionability
Most Cited Cases
A prohibition on joinder of claims and class actions is a factor to be considered in determining whether an arbitration provision is unconscionable (Per Timmons-Goodson, J , with two justices concurring and two justices concurring in the result.)

*364 Appeal pursuant to N C.G.S § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 177 N.C App 568, 629 S E.2d 865 (2006), reversing an order denying defendants' motion to compel arbitration entered on 20 January 2005 by Judge Ronald L. Stephens in Superior Court, Vance County, and remanding for entry of an order granting that motion. Heard in the Supreme Court 13 February 2007.

Jones Martin Parris & Tessener Law Offices, P L.L.C , by John Alan Jones and G. Christopher Olson, Raleigh, for plaintiff-appellants
Moore & Van Allen, PLLC, by Jeffrey M. Young, Morrisville, and Rogers & Hardin LLP, by Richard H. Sinkfield and Christopher J Willis, Atlanta, GA, for defendant-appellees.
*365 North Carolina Justice Center, by Carlene McNulty, Raleigh, for North Carolina Justice Center, Financial Protection Law Center, and Trial Lawyers for Public Justice, amici curiae.
Ellis & Winters LLP, by Wendy I. Sexton, Raleigh, for American Financial Services Association, Chamber of Commerce of the United States of America, and Consumer Bankers Association, amici curiae

The question chiefly presented is whether the arbitration clause contained in the loan agreements that serve as the basis for the instant case is unconscionable. Because the clause is one-sided, prohibits joinder of claims and class actions, and exposes claimants to prohibitively high costs, we hold that the trial court did not err in concluding as a matter of law that the clause is unconscionable.

TIMMONS-GOODSON, Justice.

I. BACKGROUND

Plaintiffs **Fannie Lee Tillman** and Shirley Richardson ("plaintiffs") are **North Carolina** residents who obtained **loans** from defendant **Commercial Credit Loans**, Inc. (n/k/a CitiFinancial Services, Inc) On 22 September 1998, **Fannie Lee Tillman** obtained a **loan** for a term of 120 months with a principal amount of $18,253.68. In connection with the **loan, Commercial Credit** sold Mrs. **Tillman** single premium **credit** life and disability insurance with premiums of $1,058 80 and $1,005.95, respectively. On 4 June 1999, Shirley Richardson obtained a **loan** for a term of 180 months with a principal amount of $20,935.57 In connection with the loan, **Commercial Credit** sold Mrs. Richardson single premium **credit** life, disability, and involuntary unemployment insurance with premiums of $1,871.54, $1,109.49, and $1,227.72, respectively. Plaintiffs' **loan** principal amounts included their insurance premiums, which were financed over the life of the **loan**.

Credit life insurance pays off a borrower's **loan** if the borrower dies; **credit** disability pays off the **loan** if the borrower becomes disabled; and **credit** involuntary unemployment pays the **loan** if the borrower becomes involuntarily unemployed. The insurance is referred to as single premium because "the borrower is charged the entire insurance premium at the time the underlying **loan** is originated, with the premium being financed into and over the life of the **loan**." In July 1999 the **North Carolina** General Assembly outlawed single premium **credit** insurance for **loans** made or entered into on or after 1 July 2000 Act of July 15, 1999, ch. 332, sec. 5, 1999 N.C. Sess. Laws 1202, 1216 (codified at N C.G.S. § 24-10 2(b) (2005)).

It is undisputed that both plaintiffs have limited financial resources Mrs. Tillman's weekly after-tax take-home pay is approximately $258 00 Her hus-

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band is deceased, and as a result, Mrs Tillman also receives $285 60 per month in pension benefits and $1063 00 per month in Social Security benefits Mrs. Richardson works two jobs where she earns $12 70 per hour and $12.00 per hour. For both plaintiffs, their home is their most significant asset.

Plaintiffs' loan agreements contained the standard arbitration clauses that defendants have included in their loan agreements since 12 February 1996. The arbitration clause was drafted by defendants, and plaintiffs were given no opportunity to negotiate regarding the clause. The clause contains the following relevant provisions:

Agreement to Arbitrate Claims. Upon written request by either party that is submitted according to the applicable rules for arbitration, any Claim, except those specified below in this Provision, shall be resolved by binding arbitration in accordance with (i) the Federal Arbitration Act; (ii) the Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association ("Administrator"); and (iii) this Provision, unless we both agree in writing to forgo arbitration. The terms of this Provision shall control any inconsistency between the rules of the Administrator and this Provision...

. . .

Claims Excluded from Arbitration. The following types of matters will not be arbitrated. This means that neither one of us can require the other to arbitrate.

*366 • Any action to effect a foreclosure to transfer title to the property being foreclosed, or

• Any matter where all parties seek monetary damages in the aggregate of $15,000 00 or less in total damages (compensatory and punitive), costs, and fees

. . .

Appeal Either You or We may appeal the arbitrator's award to a three-arbitrator panel selected through the Administrator, which shall reconsider *de novo* any aspect of the initial award requested by the appealing party The expedited procedures of the Administrator shall *not* govern any appeal. An appeal will be governed by Rule 23 of the Comprehensive Arbitration Rules and Procedures of J*A*M*S/Endispute, Inc

No Class Actions/No Joinder of Parties You agree that any arbitration proceeding will only consider Your Claims Claims by or on behalf of other borrowers will not be arbitrated in any proceeding that is considering Your Claims Similarly, You may not join with other borrowers to bring claims in the same arbitration proceeding, unless all of the borrowers are parties to the same Credit Transaction

Costs The cost of any arbitration proceeding shall be divided as follows:

• The party making demand upon the Administrator for arbitration shall pay $125 00 to the Administrator when the demand is made.

• We will pay to the Administrator all other costs for the arbitration proceeding up to a maximum of one day (eight hours) of hearings.

• All costs of the arbitration proceeding that exceed one day of hearing will be paid by the nonprevailing party.

• In the case of an appeal, the appealing party will pay any costs of initiating an appeal. The nonprevailing party shall pay all costs, fees, and expenses of the appeal proceeding and, if applicable, shall reimburse the prevailing party for the cost of filing an appeal.

• Each party shall pay his/her own attorney, expert, and witness fees and expenses, unless otherwise required by law.

. . .

Severability. If the arbitrator or any court determines that one or more terms of this Provision or the arbitration rules are unenforceable, such determination shall not impair or affect the enforceability of the other provisions of this Agreement or the arbitration rules.

In June 2002 plaintiffs commenced this suit FN1 a gainst defendants Commercial Credit Loans, Inc., Commercial Credit Corporation, Citigroup, Inc., CitiFinancial, Inc., CitiFinancial Services, Inc., and Citicorp, Inc.,[FN2] a sserting claims for violations of North Carolina's Unfair and Deceptive Trade Practices Act, N.C G S. § 75-1.1, unjust en-

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richment, and breach of the duties of good faith and fair dealing. The claims rest on plaintiffs' contention that they did not want or need single premium credit insurance and that Commercial Credit did not tell them that the insurance was optional. In addition, plaintiffs claim that Commercial Credit was the sole beneficiary of the insurance policies. Plaintiffs' complaint specifically alleges that "Commercial Credit violated North Carolina law by failing to provide Plaintiffs with requisite disclosures regarding the credit insurance sold to them and by charging fees that were deceptive, unfair, duplicative, imposed without adequate commercial justification or disclosure, and in excess of the fees permitted by North Carolina law." Plaintiffs seek money damages based on the amount of *367 credit insurance premiums collected by defendants.

FN1. Plaintiffs filed this suit as a class action, but the record contains no indication that the trial court certified the class.

FN2. Commercial Credit Corp., Citigroup, Inc., CitiFinancial, Inc., and Citicorp, Inc. are corporate parents or affiliates of Commercial Credit Loans, Inc. (n/k/a CitiFinancial Services, Inc.). While Commercial Credit Corp., Citigroup, Inc., CitiFinancial, Inc., and Citicorp, Inc. remain as defendants in the underlying case, for purposes of the issue on appeal before this Court, the term "defendants" will refer only to Commercial Credit Loans, Inc. (n/k/a CitiFinancial Services, Inc.) and CitiFinancial, Inc.

Beginning in May 2003, defendants filed a series of motions to compel arbitration pursuant to the arbitration clause contained in plaintiffs' loan agreements. In an order entered on 20 January 2005, the trial court denied defendants' motion to compel arbitration dated 17 June 2004. The order included the following findings of fact:

9. The Commercial Credit arbitration clause is a standard-form contract of adhesion. The borrower is given no opportunity to negotiate out of the arbitration provision, and CitiFinancial Services, Inc. would not make a loan if the loan agreement did not include the arbitration provision. The loan documents, including the arbitration provision at issue, were drafted by Defendant.

10. Since the time CitiFinancial Services, Inc. began including an arbitration clause in its loan agreements, the lender has made more than 68,000 loans in North Carolina. During that time, CitiFinancial Services has pursued lawsuits in civil court against more than 3,700 borrowers in North Carolina, including over 2,000 collection actions and more than 1,700 foreclosure actions. Defendant has been able to pursue claims in civil court by virtue of two exceptions within the arbitration clause, which Defendant drafted, for (1) foreclosure actions and (2) matters in which less than $15,000.00 in damages, including costs and fees, are sought. The average amount in dispute in matters in which CitiFinancial Services, Inc. pursued legal action against North Carolina borrowers is under $7,000.00.

11. Since the time CitiFinancial Services, Inc. began including an arbitration provision in its loan agreements, there have been no arbitration proceedings in North Carolina involving CitiFinancial Services, Inc. and any of its borrowers. Since introduction of the arbitration clause, no North Carolina borrower has requested arbitration of any dispute with CitiFinancial Services, Inc., nor has CitiFinancial Services, Inc. demanded arbitration of any dispute involving any North Carolina borrower. The only legal redress sought has been the collection and foreclosure actions pursued in civil court by Defendant against its borrowers.

12. The only persons present at the loan closings involving Plaintiffs Tillman and Richardson were Plaintiffs and a Commercial Credit loan officer. [Mrs.] Tillman and [Mrs.] Richardson were rushed through the loan closings, and the Commercial Credit loan officer indicated where [Mrs.] Tillman and [Mrs.] Richardson were to sign or initial the loan documents. There was no mention of credit insurance or the arbitration clause at the loan closings.

13. The compensation rates for American Arbitration Association ("AAA") arbitrators in North

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Carolina range from $500 00 to $2,380 00 per day The average daily rate of AAA arbitrator compensation in North Carolina is $1,225.00.

14. Plaintiffs Fannie Lee Tillman and Shirley Richardson entered into contingency fee contracts with the attorneys representing them. The contingency fee contract is typical of such agreements. The contingency fee agreement entered into by Plaintiffs provides that their attorneys will not be entitled to any fee unless there is some monetary recovery obtained on behalf of Plaintiffs, either by way of settlement or verdict. The agreement further provides that the law firm representing Plaintiffs shall advance the costs and expenses incurred in prosecuting the action

15. Based upon the 1998 North Carolina Bar Association Economic Survey, the most recent survey published, the average hourly rate for attorneys working on litigation matters such as this is between $150 00-$250 00 per hour

16. Based upon the limited financial resources of Plaintiffs and other similarly situated borrowers, they could not afford to hire an attorney to be paid on an hourly basis. The only realistic means by which persons in the position of Plaintiffs can prosecute their claims is by entering into a contingency fee agreement with lawyers willing to advance the costs and expenses of the litigation and with the law firm *368 assuming the risk that there might be no recovery

17 Plaintiffs asserted claims for relief under Chapter 75 of the North Carolina General Statutes, contending that Defendant['s] sale of single-premium credit insurance in connection with real estate loans constituted an unfair or deceptive trade practice or act in or affecting commerce. Plaintiffs seek damages based upon the amount of premiums charged for those credit insurance products. In most cases, the premium charges for single-premium credit insurance sold by CitiFinancial Services, Inc were under $5,000.00 per loan. Plaintiff Fannie Lee Tillman was charged $2,064.75 in single-premium credit insurance premiums in connection with her September 22, 1998 loan; Plaintiff Shirley Richardson was charged $4,208 75 for single-premium credit insurance with her June 4, 1999 loan. The relatively modest damages claimed by Plaintiffs make it unlikely that any attorneys would be willing to accept the risks attendant to pursuing claims against one of the nation's largest lenders, even with the prospect of a treble damages award and statutory attorney's fees. It would not be feasible to prosecute the claims of the named Plaintiffs and of putative class members on an individual basis.

18. Defendant's arbitration clause contains features which would deter many consumers from seeking to vindicate their rights. These features include the cost-shifting ("loser pays") provision with respect to the initial arbitration proceeding to the extent it exceeds eight hours, the cost-shifting provision associated with the *de novo* appeal from that initial arbitration proceeding, and the prohibition on joinder of claims and class actions. The prohibition on class actions and the cap of $15,000 00 on the value of claims that can be pursued outside of the arbitration process designed by Defendant make [] it unlikely that borrowers would be able to retain lawyers willing to pursue litigation against a large commercial entity, such as CitiFinancial Services, Inc

19. To successfully prosecute a complex case, including a class action such as this one, a law firm would likely need the assistance of expert witnesses. The hourly fees of experts in the fields of economics, lending practices, and credit insurance can range from $150.00 to $300 00 per hour, plus expenses. In complex cases, litigation costs and expenses, including deposition costs, travel expenses, and expert witness fees, can easily run into thousands of dollars. The class action mechanism allows persons with relatively small claims to pool their resources and have those litigation expenses and costs shared among all class members. The class action device provides a means by which consumers with modest damages claims can obtain representation by competent counsel with sufficient resources to afford protracted litigation in complex cases

Ultimately, the trial court denied the motion to compel arbitration based on its conclusion that the arbitration clause contained in plaintiffs' loan

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agreements is unconscionable and unenforceable

due to the prohibitively high arbitration costs borrowers might face in pursuing claims through arbitration, the fee-shifting ("loser pays") provisions which expose borrowers to excessive arbitration and appeal costs ..., and because the arbitration clause is excessively one-sided and lacks mutuality in that it preserves access to the courts for the lender while prohibiting joinder of claims and class actions on the part of borrowers and restricts what claims of borrowers can be pursued in civil court.

Defendants appealed, and a divided panel of the Court of Appeals reversed the trial court's order and remanded to the trial court for entry of an order granting defendants' motion to compel arbitration. *Tillman v Commercial Credit Loans, Inc*, 177 N.C App. 568, 629 S.E 2d 865 (2006). The COA majority held that the provisions of the arbitration agreement, "[v]iewed separately or together," do not render it unconscionable *Id.* at 582, 629 S E.2d at 875 The dissenting opinion concluded that the trial court's unconscionability finding was supported by the evidence and by North Carolina law, *369*Id.* at 595, 629 S E.2d at 883 (Hunter, J., dissenting), and plaintiffs filed an appeal of right as to that issue.

II. ANALYSIS

[1][2][3] The standard governing our review of this case is that "findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if .. there is evidence to the contrary." *Lumbee River Elec Membership Corp v City of Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 219 (1983) (citation omitted). "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *Carolina Power & Light Co. v. City of Asheville*, 358 N.C 512, 517, 597 S.E.2d 717, 721 (2004). Because unconscionability is a question of law, this Court will review *de novo* the trial court's conclusion that the arbitration agreement contained in plaintiffs' loan agreements is unconscionable *See Rite Color Chem Co. v. Velvet Textile Co*, 105 N C.App. 14, 21, 411 S.E.2d 645, 649 (1992) (citations omitted); 17A Am.Jur.2d *Contracts* § 327 (2004); John N. Hutson, Jr. & Scott A. Miskimon, *North Carolina Contract Law* § 9-14, at 556 (2001).

[4][5][6] In the instant case, many of the trial court's findings are uncontested. Furthermore, after extensive review of the record, we conclude that the eight findings of fact contested by defendant are supported by competent evidence. We review several of the contested findings here While defendants assign error to finding of fact number sixteen, *supra*, both plaintiffs testified they could not afford to hire an attorney to be paid on an hourly basis. In addition, contested finding of fact number nine, *supra*, is clearly supported by the deposition of Debra Hovatter, CitiFinancial's General Counsel for Litigation, who testified that "[t]he company does not make loans without an arbitration provision "Contested finding of fact number thirteen, *supra*, is supported by the affidavit of AAA Assistant Vice President Gerald Strathmann, who testified regarding the average compensation rates for AAA arbitrators in North Carolina. Based on our review of the record, the trial court's findings of fact are supported by competent evidence and are therefore conclusive.

[7][8][9] We now review the trial court's conclusions of law *de novo* Arbitration is favored in North Carolina. *Cyclone R oofing Co v David M. LaFave Co.*, 3 12 N.C 224, 229, 321 S E.2d 872, 876 (1984). As with any contract, however, "equity may require invalidation of an arbitration agreement that is unconscionable." *Murray v United Food & Commercial Workers Int'l Union*, 289 F 3d 297, 302 (4th Cir 2002). A court will find a contract to be unconscionable

only when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other

[10] *Brenner v Little Red Sch. House Ltd*, 302

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N C 207, 213, 274 S E 2d 206, 210 (1981) (citations omitted). An inquiry into unconscionability requires that a court "consider all the facts and circumstances of a particular case," and "[i]f the provisions are then viewed as so one-sided that the contracting party is denied any opportunity for a meaningful choice, the contract should be found unconscionable " *Id.*

[11] The Court of Appeals has held that unconscionability is an affirmative defense, and the party asserting it has the burden of proof *Rite Color Chem Co*, 105 N C App. at 20, 411 S.E.2d at 649 We agree. In the instant case, plaintiffs argue that defendants, because they are seeking to compel arbitration, have the burden of showing that the parties agreed to the arbitration provision. In support of this argument, plaintiffs rely on *King v. Owen*, 166 N.C.App. 246, 248, 601 S E.2d 326, 327 (2004), *Milon v Duke University*, 145 N C.App. 609, 617, 551 S E.2d 561, 566 (2001), *rev'd per curiam*, 355 N C. 263, 559 S.E.2d 789, *cert. dismissed*, 536 U.S. 979, 123 S.Ct. 14, 153 L.Ed 2d 878 (2002); and *Routh v. Snap-On Tools Corp.*, 108 N.C.App. 268, 272, 423 S.E.2d 791, 794 (1992), but the instant case is distinguishable. Each of those cases involved a dispute about whether an arbitration agreement had been ***370** properly executed. Here, there is no question that plaintiffs signed the agreement. Rather, the question is whether the agreement is unconscionable

[12] A party asserting that a contract is unconscionable must prove both procedural and substantive unconscionability. *See Martin v. Sheffer*, 102 N C.App. 802, 805, 403 S E 2d 555, 557 (1991); *see also* 1 James J White & Robert S. Summers, *Uniform Commercial Code* § 4-7, at 315 (5th ed 2006) [hereinafter White & Summers] ("Most courts take a 'balancing approach' to the unconscionability question, and ... seem to require a certain quantum of procedural, plus a certain quantum of substantive, unconscionability.") While this Court has never explicitly adopted this framework, we conclude that it is supported by the Court's case law and adopt it here In *Brenner*, for example, this Court determined that a contract between a parent and a private school was not unconscionable. 302 N C. at 214, 274 S.E.2d at 211. The Court so held after considering whether there was inequality of bargaining power between the parties, whether plaintiff was "forced to accept defendant's terms," and whether the contract itself "was one that a reasonable person of sound judgment might accept." *Id* at 213-14, 274 S E.2d at 211. Thus, the Court considered both the procedural and substantive aspects of the contract at issue

[13][14] According to *Rite Color Chemical Co*, procedural unconscionability involves "bargaining naughtiness" in the form of unfair surprise, lack of meaningful choice, and an inequality of bargaining power. 105 N C.App. at 20, 411 S.E.2d at 648. Substantive unconscionability, on the other hand, refers to harsh, one-sided, and oppressive contract terms. *Id* at 20, 411 S.E.2d at 648-49 Of course, unconscionability is ultimately "a determination to be made in light of a variety of factors not unifiable into a formula." White & Summers, § 4-3, at 296 (emphasis omitted). Therefore, we note that while the presence of both procedural and substantive problems is necessary for an ultimate finding of unconscionability, such a finding may be appropriate when a contract presents pronounced substantive unfairness and a minimal degree of procedural unfairness, or vice versa *See Tacoma Boatbuilding Co v. Delta Fishing Co*, 28 U C.C Rep Serv (CBC) 26, 37 n. 20 (W D.Wash 1980) ("[T]he substantive/procedural analysis is more of a sliding scale than a true dichotomy. The harsher the clause, the less 'bargaining naughtiness' that is required to establish unconscionability ").

We conclude that, taken together, the oppressive and one-sided substantive provisions of the arbitration clause at issue in the instant case and the inequality of bargaining power between the parties render the arbitration clause in plaintiffs' loan agreements unconscionable.

A. PROCEDURAL UNCONSCIONABILITY

[15] In the instant case, the trial court did not

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explicitly conclude that the facts supported a finding of procedural unconscionability We note, however, that the trial court made the following finding of fact, which is supported by evidence in the record. "[Mrs.] Tillman and [Mrs.] Richardson were rushed through the loan closings, and the Commercial Credit loan officer indicated where [Mrs.] Tillman and [Mrs.] Richardson were to sign or initial the loan documents. There was no mention of credit insurance or the arbitration clause at the loan closings." In addition, defendants admit that they would have refused to make a loan to plaintiffs rather than negotiate with them over the terms of the arbitration agreement Finally, the bargaining power between defendants and plaintiffs was unquestionably unequal in that plaintiffs are relatively unsophisticated consumers contracting with corporate defendants who drafted the arbitration clause and included it as boilerplate language in all of their loan agreements. We therefore conclude that plaintiffs made a sufficient showing to establish procedural unconscionability

B. SUBSTANTIVE UNCONSCIONABILITY

[16] The trial court found the arbitration clause to be substantively unconscionable because (1) the arbitration costs borrowers may *371 face are "prohibitively high"; (2) "the arbitration clause is excessively one-sided and lacks mutuality", and (3) the clause prohibits joinder of claims and class actions. We agree that here, the collective effect of the arbitration provisions is that plaintiffs are precluded from "effectively vindicating [their] ... rights in the arbitral forum" *Green Tree Fin Corp.-Ala v Randolph,* 531 U.S. 79, 90, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000).

In *Green Tree,* the United States Supreme Court recognized that "the existence of large arbitration costs" could serve as the basis for holding an arbitration clause to be unenforceable *Id* The Court ultimately held that the plaintiff in that case had not sufficiently demonstrated "the likelihood of incurring such costs" because the arbitration clause in question did not specify who would bear the costs of arbitration. 531 U.S. at 91-92, 121 S.Ct. 513. The Court disregarded evidence presented by the plaintiff about the average arbitral fees of the American Arbitration Association ("AAA") because there was no factual showing that AAA would be conducting the arbitration or that the plaintiff would be required to pay the fees. *Id.* at 90 n. 6, 121 S Ct. 513.

Similarly, the Fourth Circuit has held that any inquiry into arbitration costs must be "a case-by-case analysis that focuses .. upon the claimant's ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims." *Bradford v Rockwell Semiconductor Sys., Inc*, 238 F 3d 549, 556 (4th Cir.2001). In *Bradford,* the court found that costs were not prohibitive because the plaintiff "offered no evidence that he was unable to pay the $4,470.88 [fee], or that the fee-splitting provision deterred him from pursuing his statutory claim or would have deterred others similarly situated." *I d.* a t 558. Indeed, the court noted that the plaintiff's base salary at the time of the actions which led him to instigate the lawsuit in question was $115,000 per year *Id.* at 558 n. 6.

The instant case is distinguishable. In terms of ability to pay, the evidence of plaintiffs' limited financial means is uncontested Plaintiffs live paycheck to paycheck and usually have very little money left in their bank accounts after paying their monthly bills The arbitration clause specifies that AAA will administer any arbitration between the parties to the loan agreement, and evidence in the record indicates that the average daily rate of AAA arbitrator compensation in North Carolina is $1,225.00. According to the arbitration clause, when an arbitration lasts more than eight hours, the loser will be charged with costs. Moreover, the clause provides for a *de novo* appeal before a panel of three arbitrators, and again, the loser pays the costs For example, at the average rate, a two-day appeal would cost the losing party $7,350 00 in arbitrator fees Plaintiffs simply do not have the resources to risk facing these kinds of fees. *See*

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Vasquez-Lopez v Beneficial Oregon, Inc, 210 Or App 553, 574, 152 P 3d 940, 952 (2007) (concluding that a cost-sharing provision in an arbitration clause was "sufficiently onerous to act as a deterrent to [the] plaintiffs' vindication of their claim").

Bradford also rightly notes that the cost of arbitration must be compared with the cost of litigation *Id* at 556 As demonstrated above, paying for arbitrators is a significant cost that is simply not faced in filing a lawsuit in court. *See Vasquez-Lopez*, 210 Or.App. at 574, 152 P 3d at 952 ("regardless of whether filing fees are relatively equal in court and arbitration, the fact remains that most of the cost involved in an arbitration will be the arbitrator's fees, in court, by contrast, neither party has to pay for the judge") The trial court also found that

[t]he only realistic means by which persons in the position of Plaintiffs can prosecute their claims is by entering into a contingency fee agreement with lawyers willing to advance the costs and expenses of the litigation and with the law firm assuming the risk that there might be no recovery

Because plaintiffs' damage amounts are so low (under $4,500 each), the trial court found that it is "unlikely that any attorneys would be willing to accept the risks attendant to pursuing [these] claims." The likelihood that an attorney would take a case controlled by the arbitration clause at issue here is even *372 less because the arbitration clause prohibits the joinder of claims and class actions. Therefore, neither attorneys nor plaintiffs are able to share the risks attendant to pursuing this litigation

Bradford finally instructs that in order to find unenforceability due to excessive costs, the cost differential between litigation and arbitration must be so great that it deters individuals from bringing claims under the arbitration clause. *Id* at 556. Evidence in the record indicates that no arbitrations have been brought under the clause that defendant has included in over 68,000 loan agreements in North Carolina Based on this evidence and the above analysis, it appears that the combination of the loser pays provision, the *de novo* appeal process, and the prohibition on joinder of claims and class actions creates a barrier to pursuing arbitration that is substantially greater than that present in the context of litigation. We agree with the trial court that "[d]efendant's arbitration clause contains features which would deter many consumers from seeking to vindicate their rights."

[17] Defendants argue that the costs analysis is irrelevant because the terms of the arbitration agreement have been superceded by AAA's Consumer Rules, which became effective on 1 March 2002. More specifically, defendants state that they are "willing to arbitrate [plaintiffs'] claims under [these rules]." This argument is unpersuasive First, the arbitration clause itself provides that "[t]he terms of this Provision shall control any inconsistency between the rules of the [AAA] and this Provision." Second, this Court, the Fourth Circuit, and other courts have held that it is inappropriate to rewrite an illegal or unconscionable contract. *See Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 676 (6th Cir.2003) ("In considering the ability of plaintiffs to pay arbitration costs under an arbitration agreement, reviewing courts should not consider after-the-fact offers by employers to pay the plaintiff's share of the arbitration costs where the agreement itself provides that the plaintiff is liable, at least potentially, for arbitration fees and costs."); *Murray*, 289 F.3d at 304 ("The arbitration agreement is unenforceable as written and [the union] may not rewrite the arbitration clause and adhere to unwritten standards on a case-by-case basis in order to claim that it is an acceptable one."), *Kinkel v Cingular Wireless, LLC*, 223 Ill.2d 1, 13-14, 306 Ill.Dec. 157, 857 N.E.2d 250, 259 (2006) ("[A] defendant's after-the-fact offer to pay the costs of arbitration should not be allowed to preclude consideration of whether the original arbitration clause is unconscionable "); *Whittaker Gen. Med Corp v Daniel*, 324 N.C. 523, 528, 379 S E 2d 824, 828 (1989) ("The courts will not rewrite a contract if it is too broad but will simply not enforce it."). We agree with the Sixth Circuit's observation that because the underlying concern is whether individu-

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als, upon reading an arbitration agreement, will be deterred from bringing a claim, courts must consider the agreement as drafted. *See Morrison*, 317 F.3d at 676-77

The second concern plaintiffs raise is the one-sidedness of the arbitration clause contained in their loan agreements. In *Brenner*, this Court held that when "the provisions [of a contract] are ... viewed as so one-sided that the contracting party is denied any opportunity for a meaningful choice, the contract should be found unconscionable" 302 N C at 213, 274 S E 2d at 210

In the instant case, the clause excepts from arbitration foreclosure actions and actions in which the total damages, costs, and fees do not exceed $15,000 Plaintiffs argue that the arbitration clause preserves defendants' ability to pursue its claims in court while denying plaintiffs that same option. Evidence in the record indicates that since 1996, defendants have brought over 2,000 collection actions with an average "payoff" of under $7,000. In addition, it appears that defendants have not initiated arbitration in North Carolina. In other words, every time defendants have taken legal action against a borrower, they have managed to avoid application of the arbitration clause This arbitration clause is not as egregious as some that specifically carve out an exception for the corporate drafter of the clause to pursue collection actions in court. *See, e g*, *373*Arnold v United Cos Lending Corp*, 204 W Va. 229, 233, 235-37, 511 S.E 2d 854, 858, 860-62 (1998). Practically speaking, however, the exceptions appear to be designed far more for the benefit of defendants than for plaintiffs. The one-sidedness of the clause therefore contributes to our overall conclusion that it is unconscionable.

[18] Plaintiffs finally argue that the arbitration clause is unconscionable because it prohibits joinder of claims and class actions Plaintiffs correctly note that an increasing number of courts have found class action waivers in arbitration clauses substantively unconscionable. *See, e g, Scott v. Cingular Wireless*, 160 Wash.2d 843, 850-51, 161 P.3d 1000, 1004 (2007) (citing such cases from sixteen jurisdictions). Taken alone, such a prohibition may be insufficient to render an arbitration agreement unenforceable, *see, e.g., Adkins v. Labor Ready, Inc*, 303 F.3d 496, 503 (4th Cir 2002), but *Brenner* instructs that an unconscionability analysis must consider all of the facts and circumstances of a particular case, 302 N.C. at 213, 274 S E.2d at 211. Therefore, the trial court correctly concluded that a prohibition on joinder of claims and class actions "is a factor to be considered in determining whether an arbitration provision is unconscionable." *Accord Kristian v Comcast Corp*, 446 F.3d 25, 53-61 (1st Cir.2006); *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir.2003), *cert. denied*,540 U.S. 811, 124 S.Ct. 53, 157 L.Ed.2d 24 (2003); *Leonard v Terminix Int'l Co*, 854 So.2d 529, *passim* (Ala.2002) (per curiam); *State ex rel Dunlap v Berger*, 211 W Va. 549, 562-64, 567 S.E 2d 265, 278-80,*cert denied*,537 U.S. 1087, 123 S Ct 695, 154 L.Ed 2d 631 (2002).

In the instant case, the prohibition on joinder of claims and class actions affects the unconscionability analysis in two specific ways. First, the prohibition contributes to the financial inaccessibility of the arbitral forum as established by this arbitration clause because it deters potential plaintiffs from bringing and attorneys from taking cases with low damage amounts in the face of large costs that cannot be shared with other plaintiffs. Second, the prohibition contributes to the one-sidedness of the clause because the right to join claims and pursue class actions would benefit only borrowers. *See, e.g., Szetela v Discover Bank,*. 97 Cal App.4th 1094, 1101, 118 Cal.Rptr.2d 862, 867 (2002), *cert denied*,537 U S. 1226, 123 S.Ct 1258, 154 L.Ed.2d 1087 (2003), *Vasquez-Lopez*, 210 Or.App at 569, 152 P.3d at 949-50 (quoting Anatole France's observation in *The Red Lily* that " 'the majestic equality of the laws forbid[s] rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread' " and noting that "[a]lthough the arbitration rider with majestic equality forbids lenders as well as borrowers from bringing class actions, the likelihood of the lender seeking to do so against its own customers is as likely as the rich seeking to sleep under bridges.").

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In conclusion, we hold that the provisions of the arbitration clause, taken together, render it substantively unconscionable because the provisions do not provide plaintiffs with a forum in which they can effectively vindicate their rights. *See Green Tree*, 531 U S at 90, 121 S Ct 513

At oral argument, defendants asserted that any provisions of the arbitration clause found to be unconscionable could be stricken because the clause includes a severability provision. Severing the unenforceable provisions of the arbitration clause at issue in the instant case would require the Court to rewrite the entire clause, and we decline to do so here.

Ultimately, based on the facts and circumstances of this case, we hold that the arbitration clause in plaintiffs' loan agreements is unconscionable and therefore unenforceable. The inequality of bargaining power between the parties and the oppressive and one-sided nature of the clause itself lead us to this conclusion. Through the arbitration clause at issue in this case, defendants have not only unilaterally chosen the forum in which they want to resolve disputes, but they have also severely limited plaintiffs' access to the forum of their choice. Defendants argue that finding this clause to be unconscionable would be "hostile to arbitration." We disagree but at the same time reaffirm this Court's previous statements acknowledging the State's strong public policy favoring arbitration. However, this particular arbitration clause simply does not allow for meaningful *374 redress of grievances and therefore, under *Green Tree*, must be held unenforceable.

For the foregoing reasons, the Court of Appeals decision reversing the trial court's order denying defendants' motion to compel is reversed

REVERSED.

Justice EDMUNDS concurring in the result only.

I concur in the result only and agree that the trial court properly denied defendants' motion to compel arbitration. I write separately because I believe that this Court should apply the totality of the circumstances test set out in *Brenner v. Little Red School House, Ltd*, 302 N C. 207, 274 S.E 2d 206 (1981).

In *Brenner*, w e considered whether a contract between a noncustodial parent and a private school was unconscionable. *Id.* at 213-14, 274 S.E.2d at 210-11. T he contract required the school to enroll the plaintiff's son during the upcoming school year in exchange for payment of a confirmation fee and tuition. *Id.* at 208-09, 274 S.E.2d at 208. The contract further provided that tuition was "payable in advance on the first day of school, no portion refundable." *Id.* at 208, 274 S.E 2d at 208 The plaintiff paid the confirmation fee and tuition as required, but the child's custodial parent refused to allow the child to attend the school. *Id* at 208-09, 274 S.E.2d at 208. When the defendant denied the plaintiff's subsequent request for a refund, the plaintiff filed suit in district court alleging, in part, unconscionability of the contract. *Id.* at 209, 274 S.E.2d at 208. The trial court granted summary judgment for the plaintiff *Id.*

On review, we explained that "a court must consider all the facts and circumstances of a particular case" to "determin[e] whether a contract is unconscionable." *Id.* at 213, 274 S E.2d at 210 If the court, after examining the totality of the circumstances, determines that "the inequality of the bargain is so manifest as to shock the judgment of a person of common sense" and that "the terms are so oppressive that no reasonable person would make them on the one hand" or "accept them on the other," then the court may "refuse to enforce [a] contract on the ground of unconscionability." *Id.* Circumstances this Court considered in *Brenner* included equality of bargaining power, availability of other schools, and reasonableness of the disputed term. *Id.* at 213-14, 274 S E.2d at 211. We found that "[t]he bargain was one that a reasonable person of sound judgment might accept" and concluded that the contract was "enforceable as written." *Id.* at 214, 274 S E.2d at 211.

Applying *Brenner* here, I am persuaded that the facts and circumstances found by the trial court es-

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tablish that the arbitration clause is unconscionable Particularly compelling circumstances include the cost-shifting ("loser pays") provision for arbitration proceedings exceeding eight hours, the cost-shifting provision for de novo appeal from the initial arbitration, the prohibitions against joinder of claims and class actions, the $15,000 00 cap on the value of claims that can be pursued outside of arbitration, and the exclusion of foreclosure claims from arbitration The cost-shifting provisions are particularly onerous because the trial court found that "compensation rates for American Arbitration Association ("AAA") arbitrators in North Carolina range from $500.00 to $2,380.00 per day," that "[t]he average daily rate of AAA arbitrator compensation in North Carolina is $1,225.00," that "the average hourly rate for attorneys working on litigation matters such as this is between $150 00-$250 00 per hour," and that "[t]o successfully prosecute a complex case . such as this one [] a law firm would likely need the assistance of expert witnesses in the fields of economics, lending practices, and credit insurance" whose rates "can range from $150.00 to $300.00 per hour, plus expenses"

Taken together, these circumstances effectively prevented plaintiffs from vindicating their rights under the contract in any forum. At the same time, the exclusionary clause allows defendants to pursue claims against borrowers in superior court. Perhaps the lopsided effect of the arbitration clause is best demonstrated by defendant CitiFinancial Services, Inc.'s (CitiFinancial) 68,000-to-*375 0 record. Since it began including this arbitration clause in its loan agreements, CitiFinancial has made more than 68,000 loans in North Carolina. While no North Carolina borrower has ever requested arbitration of any dispute with CitiFinancial, CitiFinancial has pursued lawsuits in civil court against more than 3,700 borrowers in North Carolina, including more than 2,000 collection actions and 1,700 foreclosures. CitiFinancial has never requested arbitration of any dispute involving a North Carolina borrow- er.

Based on the preceding circumstances found by the trial court, I would hold that the inequality of the bargain represented by the arbitration clause is so manifest as to shock the judgment of a person of common sense, and that the term is so oppressive that no reasonable person would offer it on the one hand or accept it on the other.

This Court has long held that "findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . there is evidence to the contrary" *Lumbee River Elec Membership Corp. v City of Fayetteville,* 309 N.C. 726, 741, 309 S.E.2d 209, 219 (1983); *see also Cardwell v Cardwell,* 64 N.C. 528, 528, 64 N C 621, 622 (1870) ("We can no more review the finding of a Judge when it is his province to find facts than we can review the finding of a jury."). The form or manner in which a trial court receives evidence has never controlled the standard of review an appellate court applies to the trial court's findings of fact. *See, e g., State v Elliott,* 360 N C. 400, 417, 628 S.E.2d 735, 747 (applying a deferential standard to the trial court's findings of fact when those findings were based upon a newspaper article), *cert denied,*-- U S. ----, 127 S.Ct. 505, 166 L Ed.2d 378 (2006); *Stephenson v Bartlett,* 357 N.C. 301, 309, 582 S.E.2d 247, 252 (2003) (applying a deferential standard of review to the trial court's findings of fact when those findings were based upon written redistricting plans); *Homebuilders Ass'n of Charlotte, Inc. v City of Charlotte,* 336 N C. 37, 47, 442 S.E 2d 45, 52 (1994) (applying a deferential standard of review to the trial court's findings of fact when those findings were based upon uncontradicted affidavits).

We should not hasten to abandon century-old precedent applying a deferential standard of review to a trial court's findings of fact, especially when the issue has not been raised, briefed, or argued by any party

For the reasons stated above, I concur in the result only

Justice MARTIN joins in this separate opinion.
Justice NEWBY dissenting

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I recognize that subprime lenders are under close scrutiny and that our General Assembly decided to outlaw the sale of single premium insurance some time after the execution of the contracts at issue. This case, however, is not about regulating subprime loans. Instead, the Court's decision today implicates bedrock principles of contract law which should not be disturbed in response to policy concerns over a disfavored industry. For the first time in our history, a North Carolina appellate court has found a contract to be unconscionable

Although the majority [FN3] ostensibly applies general principles of state contract law to render this arbitration agreement unconscionable, in effect the majority finds it unconscionable precisely because it is an agreement to arbitrate. By holding that the collective effect of provisions unique to arbitration agreements renders the instant agreement unconscionable, the majority treats this contract differently from other contracts. Such an approach is precluded by federal law. *See*9 U.S.C. § 2 (2000) (making arbitration agreements "valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of *any contract* "(emphasis added)); *Perry v. Thomas*, 482 U.S 483, 493 n. 9, 107 S.Ct. 2520, 2527 n. 9, 96 L.Ed 2d 426, 437 n 9 (1987) ("Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement*376 would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot."); *Gay v CreditInform*, 511 F 3d 369, ----, (3d Cir.2007) (rejecting a plaintiff's challenge to an arbitration agreement in which she "relie[d] on the uniqueness of the arbitration provision in framing her unconscionability argument" and "contende[d] that the provision is unconscionable because of what it provides, i.e , arbitration of disputes on an individual basis in place of litigation possibly brought on a class action basis").

FN3. The "majority" refers to those members of this Court embracing the principal opinion or the concurring opinion The "principal opinion" refers to the opinion of Justice Timmons-Goodson. The "concurring opinion" refers to the opinion of Justice Edmunds.

Because I believe that today's holding is neither compelled by the facts under our state law nor complies with federal law, I respectfully dissent

I. FEDERAL LAW

The contract in this case provides for a means of alternative dispute resolution, arbitration, which is favored in North Carolina. *See, e g , Cyclone Roofing Co v. David M. LaFave Co*, 312 N.C 224, 229, 321 S E 2d 872, 876 (1984) Our state's policy is consistent with "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr Corp*, 460 U S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765, 785 (1983). The Federal Arbitration Act ("FAA") makes all arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C § 2. The purpose of the FAA was "to reverse the longstanding judicial hostility to arbitration agreements .. and to place arbitration agreements upon the same footing as other contracts." *Gilmer v Interstate/Johnson Lane Corp*, 500 U.S. 20, 24, 111 S.Ct 1647, 1651, 114 L.Ed.2d 26, 36 (1991); *see also Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc*, 473 U.S 614, 626-27, 105 S Ct. 3346, 3354, 87 L.Ed.2d 444, 455 (1985) ("[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."). "The [FAA] establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability " *Cone Mem'l Hosp.*, 460 U.S. at 24-25, 103 S.Ct. at 941, 74 L.Ed.2d at 785 Accordingly, the United States Supreme Court has recognized that arbitration can be an appropriate forum for the resolution of federal statutory claims and

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has enforced agreements to arbitrate such claims. *See, e g, Rodriguez de Quijas v Shearson/Am Express, Inc.*, 490 U.S 477, 109 S.Ct. 1917, 104 L Ed 2d 526 (1989) (Securities Act of 1933); *Shearson/Am. Express Inc. v McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987) (Securities Exchange Act of 1934 and Racketeer Influenced and Corrupt Organizations Act); *Mitsubishi*, 473 U S 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (Sherman Act).

Likewise, in *Burke County Public Schools Board of Education v. Shaver Partnership*, this Court held that agreements to arbitrate disputes arising under any contract involving "substantial interstate activity" are enforceable under the FAA "notwithstanding conflicting state law." 303 N C. 408, 420, 422, 279 S.E.2d 816, 823, 824 (1981). There, we recognized the benefit of "uniformity" in the enforcement of arbitration agreements in state and federal courts. *Id* at 422, 279 S.E 2d at 824.

It is important to note the interplay between state and federal law with respect to arbitration agreements: federal law makes an arbitration agreement enforceable except when common law principles, such as unconscionability, make it unenforceable The common law defense must apply to contracts generally and not arise because the subject is an arbitration agreement. *See Doctor's Assocs v Casarotto*, 517 U S 681, 687, 116 S.Ct 1652, 1656, 134 L.Ed.2d 902, 909 (1996) ("Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status. ."); *Perry*, 482 U.S. at 493 n. 9, 107 S.Ct. at 2527 n. 9, 96 L.Ed.2d at 437 n. 9 ("A court may not, then, in assessing the rights of litigants to *377 enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law ")

Because this case is the first time this Court has held a contract unconscionable, and since the majority agrees that this arbitration agreement is unconscionable because of the collective effect of the arbitration agreement's terms, today's holding creates a preemption issue. The majority finds the agreement unconscionable based on provisions that would only exist in an arbitration agreement Further, the principal opinion's finding of unconscionability involves a misapplication of a United States Supreme Court test specifically applicable to arbitration costs. *See Green Tree Fin. Corp -Ala v Randolph*, 531 U.S. 79, 89-92, 121 S.Ct. 513, 521-23, 148 L Ed 2d 373, 382-84 (2000).

In short, the majority concludes this arbitration agreement is unconscionable because it contains provisions common to many arbitration agreements. This result is precisely the one rejected recently by the United States Court of Appeals for the Third Circuit. In *Gay v CreditInform*, the Third Circuit specifically warned that state court analysis of an arbitration agreement cannot focus on the uniqueness of an arbitration agreement as grounds for unconscionability. 2007 WL 4410362, at *21 Additionally, the Eleventh Circuit has recently upheld an arbitration agreement in the face of challenges similar to those raised in this case, particularly in reference to the class action prohibition and the exceptions to arbitration *See Jenkins v. First Am Cash Advance of Ga., LLC*, 400 F.3d 868, 877 (11th Cir.2005), *cert. denied*,546 U.S. 1214, 126 S.Ct. 1457, 164 L.Ed.2d 132 (2006). These decisions by federal courts of appeals in cases factually analogous to the instant case further underscore the federal preemption issues involved here.

II STATE LAW

A. General Principles of Contract Law

This Court has emphasized the vital role contracts play in our free society:

"The right to contract is recognized as being within the protection of the Fifth and Fourteenth Amendments to the Constitution of the United States; and protected by state constitutions It has

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been held that the right to make contracts is embraced in the conception of liberty as guaranteed by the Constitution."

Alford v Textile Ins Co, 248 N C. 224, 227, 103 S.E 2d 8, 10-11 (1958) (internal citations and internal quotation marks omitted) (quoting *Morris v. Holshouser*, 220 N.C. 293, 17 S E.2d 115 (1941)). Like any freedom, the liberty to contract is coupled with corresponding responsibility· "Liberty to contract carries with it the right to exercise poor judgment as well as good judgment It is the simple law of contracts that 'as a man consents to bind himself, so shall he be bound.' " *Troitino v. Goodman*, 225 N C 406, 414, 35 S E 2d 277, 283 (1945) (citations omitted).

Equally well settled is the role courts should play in interpreting and enforcing contracts· "There can be no dispute that [a] contract between [private parties] ... there being no mistake or fraud, both being *sui juris*, is a valid and binding one " *Peoples Bank & Tr Co. v Mackorell*, 195 N.C. 741, 744, 143 S E. 518, 520 (1928), *see also id.* at 745, 143 S E at 520 (noting further, by way of example, that even " 'though [a] contract was a foolish one, it would hold in law' " (citation omitted)). "The principle is generally conceded, and it is certainly equitable, that when the benefit and the burden of a contract are inseparably connected, both must go together, and liability to the burden is a necessary incident to the right to the benefit. *Qui sentit commodum sentire debet et onus.*" *Norfleet v. Cromwell*, 70 N C. 510, 516, 70 N C 634, 641 (1874) (citations omitted).

We have also recognized that the mere fact that one party to a contract is a large, heavily regulated commercial entity does not, per se, destroy the arm's-length nature of the transaction. In considering enforcement of provisions of an insurance policy, we noted.

The insured and the defendant [insurance company] had the legal right to enter into the contract, and the parties are bound by its terms. In the absence of statutory provisions to the contrary, insurance companies have the same right as *378 individuals to limit their liability and to impose whatever conditions they please, upon their obligations, not inconsistent with public policy, and the courts have no right to add anything to their contracts or to take anything from them.

.. We must decide the case, therefore, not by what we may think would have been a wiser and more discreet contract on the part of the plaintiff, if he could have procured such a one, but by what is written in the contract actually made by them. Courts are not at liberty to rewrite contracts for the parties We are not their guardians, but the interpreters of their words We must, therefore determine what they meant by what they have said-what their contract is, and not what it should have been

Powers v Travelers Ins Co, 186 N.C. 336, 337-38, 119 S E. 481, 481-82 (1923) (internal citations and internal quotation marks omitted). Our jurisprudence counsels us to exercise caution in undertaking any judicial inquiry into the wisdom of a contract's terms, such as the one plaintiffs ask us to do here.

B Unconscionability Under *Brenner*

On one occasion alone, this Court has addressed the issue of whether a contract should be enforced because of unconscionability. In *Brenner v Little Red School House, Ltd*, we recognized that it is only in the exceptional case that a contract will be found unconscionable·

A court will generally refuse to enforce a contract on the ground of unconscionability only when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other. In determining whether a contract is unconscionable, a court must consider all the facts and circumstances of a particular case. If the provisions are then viewed as so one-sided that the contracting party is denied any opportunity for a meaningful choice, the contract should be found unconscionable.

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302 N.C. 207, 213, 274 S.E.2d 206, 210 (1981) (citations omitted) Applying this rigorous standard, no appellate court in North Carolina has held a contract unenforceable based on unconscionability

In *Brenner,* the plaintiff sought to recover tuition paid in advance to a private school when his former wife refused to allow the plaintiff's child to attend the school and the child did not attend a single day *Id.* at 208-09, 274 S E 2d at 208 Under the terms of the contract between the plaintiff and the school, tuition for the entire school year was "payable in advance on the first day of school, no portion refundable." *Id* at 208, 274 S.E.2d at 208. Applying the articulated unconscionability test to "all the facts and circumstances" in *Brenner,* we found that there was no inequality of bargaining power because the plaintiff had other choices of schools, *id.* at 213-14, 274 S.E.2d at 210-11, and that the clause making advance tuition payments on the first day of school non-refundable "[was] reasonable when considered in light of the expense to defendant in preparing to educate the child and in reserving a space for him,"*id.* at 213-14, 274 S E.2d at 211.

As the majority correctly notes, plaintiffs have the burden to prove unconscionability since they have raised it as an affirmative defense to enforceability of this contract *Rite Color Chem. Co v Velvet Textile Co,* 105 N C App 14, 20, 411 S E.2d 645, 649 (1992).

III. STANDARD OF REVIEW

Preliminarily, I question whether the majority applies the correct standard of review by deferring to the trial court's findings of fact.[FN4] We apply the deferential "competent evidence" standard to the trial court's findings*379 of fact in cases like *Lumbee River Electric Membership Corp v. City of Fayetteville,* 309 N.C. 726, 309 S.E.2d 209 (1983), relied upon by the majority, when the trial judge sits as jury and takes live evidence. *Id.* at 740-41, 309 S E.2d at 218-19. However, when as here, the trial court merely hears arguments on a motion and reviews the same cold record we review now, there is less reason to defer to the trial court as fact finder For example, we review de novo the trial court's rulings on summary judgment motions, which are argued on a record similar to the one in this case *Builders Mut. Ins. Co. v N. Main Constr., Ltd,* 361 N.C. 85, 88, 637 S.E 2d 528, 530 (2006) (citing *Howerton v Arai Helmet, Ltd,* 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004)). Federal appellate courts apply de novo review to district court denials of motions to compel arbitration *See, e g, Gay,* at ----; *Safer v. Nelson Fin. Grp., Inc.,* 422 F.3d 289, 293 (5th Cir.2005); *Jenkins,* 400 F.3d at 873; *Kidd v Equitable Life Assurance Soc'y,* 32 F.3d 516, 518 (11th Cir.1994), *cert denied,*522 U S. 1028, 118 S Ct. 626, 139 L.Ed 2d 606 (1997) Additionally, a number of federal courts liken the standard of review for a motion to compel arbitration to the standard for a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure *See, e g, Par-Knit Mills Inc. v Stockbridge Fabrics Co.,* 636 F.2d 51, 54 & n. 9 (3d Cir.1980); *Hughes v CACI, Inc.-Commercial,* 384 F.Supp 2d 89, 92-93 (D D.C.2005).[FN5]

FN4 Despite contentions to the contrary, the parties did brief the standard of review issue. Both parties included "Standard of Review" sections in their briefs to this Court, with plaintiffs arguing that the Court of Appeals majority did not defer adequately to the trial court and defendants arguing that the deference was appropriate I believe that this adequately preserves the issue for appellate review. Nonetheless, I do not find the standard of review to be dispositive in this case.

FN5. It appears that an intermediate option we could have pursued in this case was remanding to the trial court, where any disputed facts revealed by the record could have been addressed in an evidentiary hearing with the opportunity to test statements through cross-examination, this Court has remanded for such hearings in a variety of contexts. *See, e g, Stephenson v. Bartlett,* 355 N.C 354, 381, 562 S E 2d

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377, 395 (2002) (legislative redistricting), *State v McHone*, 348 N C 254, 259, 499 S.E.2d 761, 764 (1998) (criminal defendant's motion for appropriate relief); *Meiselman v Meiselman*, 309 N.C. 279, 306, 307 S.E.2d 551, 567 (1983) (minority shareholder suit to dissolve corporation).

However, even applying the competent evidence standard, I conclude that the facts, as found by the trial court, do not support the legal conclusion that this contract is unconscionable.

IV. PROCEDURAL UNCONSCIONABILITY

The principal opinion acknowledges that "procedural unconscionability involves 'bargaining naughtiness' in the form of unfair surprise, lack of meaningful choice, and an inequality of bargaining power." *Rite Color Chem. Co*, 105 N.C.App. at 20, 411 S.E.2d at 648. Applying this test, it finds the following to be sufficient to establish procedural unconscionability: the closings were rushed and the arbitration clause not mentioned; the terms were non-negotiable; and the parties' relative status, business and consumer, reflected inequality in bargaining power. Quite frankly, these factors exist in most, if not all, consumer contracts [FN6]

FN6. In the overall unconscionability analysis, the concurring opinion agrees with the principal opinion in concept, but not terminology. The concurring opinion collapses the procedural and substantive analyses under what it labels as *Brenner's* "totality of the circumstances" test. While not using the term "procedural unconscionability," the concurring opinion's analysis does analyze inequality of bargaining power and the parties' status as business and consumer. In substance, the majority of the members of this Court agree that these factors contribute to a finding of unconscionability

Under federal case law interpreting the FAA, there is a question regarding this Court's jurisdiction over plaintiffs' argument that the arbitration agreement is a contract of adhesion As noted by the principal opinion, the trial court did not extensively address the procedural unconscionability question, but did label the arbitration agreement "a standard-form contract of adhesion" More than four decades ago, the United States Supreme Court held that claims challenging the making of an arbitration agreement specifically are distinguishable from those challenging the contract, in which the arbitration agreement is included, generally *Prima Paint Corp v Flood & Conklin Mfg. Co*, 388 U S 395, 403-04, 87 S.Ct. 1801, 1806, 18 L.Ed 2d 1270, 1277 (1967). The former are reviewable by a court, while the latter are for the arbitrator to decide. *See id.* ("[A] federal court may consider only issues relating to the making and performance of *380 the agreement to arbitrate In so concluding, we not only honor the plain meaning of the [FAA] but also the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts."); *see also Buckeye Check Cashing, Inc. v Cardegna*, 546 U S. 440, 448-49, 126 S Ct. 1204, 1210, 163 L Ed.2d 1038, 1045-46 (2006) ("[T]he *Prima Paint* rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void.... We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator")

In this case, neither plaintiffs' arguments nor the majority's analysis regarding procedural unconscionability clearly distinguishes between challenges to the loan agreements and the arbitration agreements contained therein. They emphasize what happened at the loan closing, preparation of the documents by defendants, and the lack of sophistication of these subprime loan applicants Addressing similar arguments, the United States Court of Appeals for the Eleventh Circuit found that claims regarding the absence of consumer bargaining power, the types of consumers targeted, and the consumers' inability to change the contract terms

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related to allegations that the consumer loan contract as a whole was adhesive, and thus, those claims were to be decided by an arbitrator, not a court. *Jenkins,* 400 F.3d at 877.

However, even under this state's contract law, the arbitration agreement is not procedurally unconscionable. Many of the factors highlighted by the majority were present in *Brenner,* but did not result in the contract being declared unenforceable In *Brenner,* there was no discussion whether the defendant explained to the plaintiff the no refund policy, there was no indication the policy was negotiable; and presumably the provider of the service drafted the form agreement and held the keys to the schoolhouse. In our analysis of "inequality of bargaining power," we did not focus on who drafted the agreement or whether any of the specific terms were negotiable. *Id.* at 213-14, 274 S.E.2d at 211. Instead, we equated "bargaining power" with choices in the marketplace: "Plaintiff was not forced to accept [the] defendant's terms, for there were other private and public schools available to educate the child." *Id.* at 213, 274 S.E.2d at 211. Unlike compulsory schooling for children, borrowing funds is optional. Plaintiffs had the choice of whether to borrow. Further, although the trial court did not address the availability of loans from other lenders, one can assume other borrowing options existed in the subprime market. Under our controlling precedent, "[t]here was no inequality of bargaining power between the parties" since plaintiffs had other options. *Id.* They were "not forced to accept defendant [s'] terms." *Id*

It is also important to note that the arbitration agreement was not hidden or minimized As the principal opinion observes, this is not a case questioning "whether an arbitration agreement had been properly executed" and "there is no question that plaintiffs signed the agreement." The arbitration agreement alerted each plaintiff to its significance in a number of ways. Although contained in the loan document, the agreement was set off in a separate box and entitled "ARBITRATION PROVISION," which was bolded, capitalized, and underlined. The provision was introduced by the following bold, capitalized font: "READ THE FOLLOWING ARBITRATION PROVISION CAREFULLY. IT LIMITS CERTAIN OF YOUR RIGHTS, INCLUDING YOUR RIGHT TO OBTAIN REDRESS THROUGH COURT ACTION." As the provision comprised a portion of two pages, plaintiffs initialed the page transition. Directly above the borrower's signature line for the arbitration agreement, the following bold, capitalized statement appeared "READ THE ABOVE ARBITRATION PROVISION CAREFULLY. IT LIMITS CERTAIN OF YOUR RIGHTS, INCLUDING YOUR RIGHT TO OBTAIN REDRESS THROUGH COURT ACTION." Both plaintiffs signed their respective arbitration agreements separately from the signatures required on the loan agreements-a fact that *381 carries considerable legal significance *See Leonard v S Power Co.,* 155 N C. 10, 14, 70 S.E 1061, 1063 (1911) ("[T]he law will not relieve one who can read and write from liability upon a written contract, upon the ground that he did not understand the purport of the writing, or that he has made an improvident contract, when he could inform himself and has not done so ").

Defendants took steps to ensure plaintiffs would be aware of the provision by separating the arbitration agreement from other portions of the loan agreement; employing capitalization, bolding, and underlining; and requiring a separate signature. Furthermore, the loan closing was not the last opportunity plaintiffs had to review the documents and decline the loans. Contained within the arbitration provision is the borrower's right to rescind the loan within three business days Even if plaintiffs were rushed through the closing, they had three business days to read the documents and rescind the loans if desired.

In sum, the majority's analysis criticizes aspects common to all consumer transactions and fails to find the "bargaining naughtiness" required for finding procedural unconscionability.

V. SUBSTANTIVE UNCONSCIONABILITY

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The principal opinion describes substantive unconscionability as pertaining to whether the terms of the contract are harsh, one-sided, and oppressive FN7 *See Rite Color Chem. Co*, 105 N.C.App at 20, 411 S.E.2d at 648-49. The majority determines that the arbitration agreement here is substantively unconscionable based on the collective effect of its "prohibitively high" and "onerous" arbitration costs, one-sidedness and lack of mutuality, and prohibition of class actions and joinder of claims. I cannot agree. An arbitration costs provision would not be found in any type of contract except an arbitration agreement. Plaintiffs also challenge the exceptions to arbitration, which again, would only be found in an arbitration provision. Finally, plaintiffs' arguments in this case focus on the class action waiver's interaction with the other two provisions that are unique to arbitration. Thus, the unconscionability analysis in this case not only fails under the exceedingly high substantive standard prescribed by our state case law, but also risks preemption by federal law to the extent it relies on features of the instant agreement that would not be found in contracts generally

> FN7 While not using the term "substantive unconscionability," the concurring opinion criticizes the same arbitration terms as the principal opinion. The concurring opinion proceeds solely under *Brenner*, whereas the principal opinion uses federal case law in its analysis

To prove substantive unconscionability under *Brenner*, plaintiffs must show that the "inequality of the bargain is so manifest as to shock the judgment" and that the terms of the arbitration agreement "are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other." 302 N.C. at 213, 274 S.E.2d at 210. In *Brenner*, we evaluated substantive unconscionability, as we had with procedural unconscionability, in the context of the marketplace. We found the school's "no refund" policy was reasonable in light of what the student's parent received in return. preparation for his child's education and a reserved place in the class. *Id* at 213-14, 274 S.E.2d at 211. In this case, considering all the facts and circumstances, the terms of the arbitration agreement are "reasonable when considered in light of" the overall transaction [FN8] *See id.*

> FN8. Contracts for the sale of goods governed by North Carolina's Uniform Commercial Code ("UCC") are subject to the doctrine of unconscionability. *See*N.C.G S. § 25-2-302 (2007). Although the arbitration agreement here is governed by common law, not the UCC, the UCC's doctrine of unconscionability grew out of the common law. *See Rite Color Chem. Co*, 105 N.C.App. at 18, 411 S E.2d at 647-48. The official comment to the statute states:
>
> The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. [The statute] makes it clear that it is proper for the court to hear evidence upon these questions. *The principle is one of the prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power*
>
> N.C.G.S. § 25-2-302 cmt. 1 (emphasis added) (citation omitted) Consistent with *Brenner*, the UCC makes clear that the key inquiry is more about the commercial reasonableness of the contract terms than it is about the relative bargaining positions of the parties

*382 Generally speaking, the loan agreements executed between plaintiffs and defendants included a common exchange. Plaintiffs, who had impaired credit, received a loan Defendants received a promise by each plaintiff to pay back the loan under terms that would minimize defendants' risk of loss. These terms, including the interest rate, were less favorable than what was available in the conventional market, but defendants were assuming more risk by lending to plaintiffs based on their lower credit ratings. The terms of each agreement, like many other loan agreements in both the con-

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ventional and subprime markets, included an agreement to arbitrate claims There is no question in this case whether it was reasonable for defendants to include an agreement to arbitrate in their extension of credit to plaintiffs Plaintiffs merely challenge certain terms of that agreement· (1) the costs provisions; (2) the enumerated exceptions to arbitration, and (3) the prohibition on class actions and joinder of claims. Taken together or separately, these terms do not render the arbitration provision unconscionable.

A. Arbitration Costs

The focal point of the majority's analysis is the conclusion that the hypothetical arbitration costs, as stated in the agreement, prevent plaintiffs from vindicating their rights The principal opinion determines that the costs provision of this arbitration agreement presents a prohibited "barrier" under decisions by the United States Supreme Court and the United States Court of Appeals for the Fourth Circuit. However, the record in this case does not establish that the potential costs of arbitration will deter plaintiffs from "effectively vindicating" their claims of more than $15,000 each.[FN9] This arbitration fee structure withstands the tests of *Green Tree Financial Corp-Alabama v Randolph,* 531 U.S. 79, 121 S Ct. 513, 148 L Ed.2d 373 (2000), and *Bradford v. Rockwell Semiconductor Systems, Inc*, 238 F 3d 549 (4th Cir 2001).

FN9. Neither party has contested the fact that each plaintiff's claim satisfies the $15,000 threshold triggering the arbitration agreement. The majority focuses on the insurance premiums paid instead of the values of the claims. Both plaintiffs alleged three causes of action seeking compensatory damages, costs, and attorney's fees· (1) unfair and deceptive trade practices ("UDTP") under N C G.S. § 75-1.1, (2) unjust enrichment, and (3) breach of duties of good faith and fair dealing. A brief review of the smaller claim, that of Tillman, reveals the value of the claim surpasses the threshold Tillman's compensatory damages are the amount she paid for the disputed insurance ($2,064.75) plus interest at her contract rate from the date the charges began until judgment, which amounts to approximately $5,000 00. The trebling of the compensatory damages under the UDTP statute meets the $15,000 threshold, even before adding costs and attorney's fees and other potential recoveries Richardson, having paid disputed insurance premiums of $4,208.75, would have a substantially higher claim.

In *Green Tree,* the United States Supreme Court addressed the issue of arbitration costs when the purchaser of a mobile home brought a purported class action against her lenders, asserting violations of the federal Truth in Lending Act for the lenders' alleged failure to disclose certain finance charges 531 U.S. at 82-83, 121 S.Ct. at 517-18, 148 L.Ed.2d at 378-79. With respect to the plaintiff's challenge to the arbitration agreement, the Supreme Court framed the issue as "whether [the plaintiff's] agreement to arbitrate is unenforceable because it says nothing about the costs of arbitration, and thus fails to provide her protection from potentially substantial costs of pursuing her federal statutory claims in the arbitral forum." *Id* at 89, 121 S.Ct. at 521, 148 L Ed 2d at 382. Because of the scant record with respect to arbitration costs in *Green Tree,* the Court found plaintiff had failed to prove the costs were prohibitively expensive. *Id.* at 90-91, 121 S.Ct. at 522, 148 L Ed.2d at 383-84. The Court concluded that "[t]he 'risk' that [the plaintiff] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement." *Id* at 91, 121 S Ct. at 522, 148 L.Ed.2d at 384 Ultimately, *Green Tree* clarified that: *383 (1) costs are "prohibitive" if they preclude effective vindication of rights in the arbitral forum, *id* at 90, 121 S.Ct. at 522, 148 L Ed.2d at 383, and (2) a party challenging an arbitration agreement must show "the likelihood of incurring [prohibitive] costs,"*id* at 92, 121 S.Ct. at 522, 148 L Ed.2d at 384.

In *Bradford,* the United States Court of Ap-

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peals for the Fourth Circuit followed these two directives from *Green Tree* when it considered whether a fee-splitting provision rendered an arbitration agreement unenforceable. 238 F 3d at 552. The plaintiff sought redress for his age discrimination claims simultaneously through arbitration and in federal district court. *Id* at 551-52. In reviewing the costs issue, the Fourth Circuit stated that part of the key inquiry was whether "the expected cost differential between arbitration and litigation in court . is so substantial as to deter the bringing of claims" *Id* at 556 As to the particular case before it, the Fourth Circuit found that the plaintiff had not been deterred from vindicating his rights because he had in fact utilized the arbitral forum *Id* at 558.

Initially, I note that defendants argue plaintiffs cannot prove prohibitive costs because the arbitration agreement requires arbitration under the AAA's Consumer Rules enacted subsequent to the execution of plaintiffs' arbitration agreements. Under changes to the rules, if plaintiffs (or any consumers) arbitrate, they will be liable for at most $375 in arbitration costs. The majority rejects this argument by stating "it is inappropriate to rewrite an illegal contract" [FN10] However, this is not a situation in which defendants are attempting to rewrite a contract provision Rather, to use AAA as mandated by the arbitration agreement, defendants are required to comply with the new rules by paying most of the arbitration fees As a result, plaintiffs cannot show they will actually incur prohibitive costs *Green Tree,* 531 U.S. at 92, 121 S.Ct at 522, 148 L.Ed 2d at 384 Other courts have held that an after-the-fact offer from a defendant "to bear the costs of arbitration that [the plaintiff] is unable to afford" prevented the plaintiff from "demonstrat[ing] that arbitration would be prohibitively expensive." *Anders v Hometown Mortgage Servs, Inc*, 346 F 3d 1024, 1029 (11th Cir 2003); *see Large v Conseco Fin. Servicing Corp*, 292 F.3d 49, 56 (1st Cir.2002) (holding that "[the defendant's] offer to pay the costs of arbitration and to hold the arbitration in the [plaintiffs'] home state . mooted the issue of arbitration costs").

FN10 The principal opinion addresses defendants' argument directly. While the concurring opinion is silent, it simply assumes the stated contract terms are the only ones to be considered.

The principal opinion also notes in response to defendants' offer to apply the AAA's Consumer Rules that the arbitration agreement provides that "[t]he terms of this Provision shall control any inconsistency between the rules of [AAA] and this Provision." However, the arbitration agreement contains a severability clause, which should be used to excise this particular sentence. We construe contracts as a whole, give effect to the intent of the parties, and enforce contracts when unenforceable provisions can be severed. *See, e g, Whittaker Gen. Med Corp v Daniel,* 324 N.C. 523, 528, 379 S.E.2d 824, 828 (1989), *Rose v Vulcan Materials Co*, 282 N C 643, 658-59, 194 S.E.2d 521, 531-32 (1973); *In re Receivership of Port Pub Co.,* 231 N C. 395, 397-98, 57 S.E.2d 366, 367-68 (1950). By severing this sentence, the intent of the contract is effectuated through permitting AAA to conduct the arbitration and thereby allowing AAA's Consumer Rules to apply *See, e.g, State v Philip Morris USA, Inc*, 359 N.C. 763, 773, 618 S E.2d 219, 225 (2005). I do not believe severing this one sentence amounts to rewriting the entire agreement *See Whittaker Gen. Med. Corp*, 324 N C. at 528, 379 S E.2d at 828 ("If the contract is separable ... and one part is reasonable, the courts will enforce the reasonable provision."); *see also Vecellio & Grogan, Inc. v Piedmont Drilling & Blasting, Inc*, --- N C App. ----, ----, 644 S.E.2d 16, 21 ("By striking the offending language [in the indemnification clause] the Court does not rewrite the contract or substitute its own terms in the provision for those of the parties."(citing **384Int'l Paper Co. v. Corporex Constructors, Inc*, 96 N.C.App 312, 316, 385 S E.2d 553, 555 (1989))), *disc. rev denied*,361 N C. 575, 651 S.E 2d 564 (2007).

This Court's refusal to save this arbitration agreement through incorporating the AAA Consumer Rules or applying its severability clause raises the specter of preemption, because it appears we are treating this contract differently from other

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contracts. The FAA, as interpreted by the United States Supreme Court, does not permit this *See Doctor's Assocs.*, 517 U.S. at 687, 116 S.Ct. at 1656, 134 L.Ed 2d at 909; *see also Kristian v. Comcast Corp*, 446 F 3d 25, 64-65 (1st Cir.2006) (finding an arbitration agreement's limitation on the recovery of attorney's fees and costs and its class arbitration bar unenforceable in an antitrust case, but severing those provisions so that arbitration could proceed)

Even if the costs provisions were applied as written, plaintiffs have not offered more than speculation that they would incur costs. The written terms of the arbitration provision in this case provide that the costs are shifted to the non-prevailing party under two circumstances: when the initial arbitration proceeding exceeds eight hours and after a de novo appeal. The trial court's findings cited by the principal opinion do not address the likelihood that: (1) plaintiffs' initial arbitration hearings would last more than eight hours; (2) the arbitration of plaintiffs' claims would involve an appeal; or (3) plaintiffs would not prevail. The trial court's finding that "the average daily rate of AAA arbitrator compensation in North Carolina is $1,225 00" is not probative of whether the costs are prohibitive without corresponding findings that plaintiffs' arbitration would actually last more than eight hours and plaintiffs are likely to lose Under the arbitration agreement, plaintiffs must pay $125 to initiate arbitration. In civil court, plaintiffs must pay a $95 filing fee. N.C.G.S. § 7A-305 (2007). Thus, the initial financial hurdle to use both forums is marked by a difference of only $30. Because the trial court did not make any findings as to the likely length of plaintiffs' arbitrations or their likelihood of success, it could not fairly determine the costs plaintiffs would incur beyond the filing fee.

The principal opinion correctly states that *Bradford* requires a comparison of the costs of litigation with the costs of arbitration. However, in this case, the trial court did not perform such an analysis. The evidence presented and relied upon by the trial court compares the costs of litigating a class action and arbitrating as an individual. In actuality, the evidence at issue compares the costs of winning a class action and losing an individual arbitration. Clearly, this is not the proper analysis The record in this case does not offer proof from which a court can make the correct comparison: the cost to litigate an individual claim in court versus the cost to arbitrate the same claim.

B. Exceptions to Arbitration

The agreement requires arbitration for all actions in which, as here, a claim exceeds $15,000, except for foreclosure actions The majority holds this provision unconscionable under *Brenner* because it is "so one-sided that the contracting party is denied any opportunity for a meaningful choice" The majority bases this conclusion on a finding that since 1996, defendants have pursued about 2,000 collection actions in court (of the 68,000 loans made), with an average claim of $7,000, but have pursued no claims in arbitration The majority concludes the exceptions were "specifically carve[d] out" for the corporate drafter to avoid arbitration. I do not agree.

The arbitration agreement's exclusion from arbitration of claims under $15,000 is not manifestly unreasonable; it was not even designed by this lender. As defendants point out, the American Arbitration Association ("AAA"), which would administer any arbitration between these parties, requires that claims under $15,000 be excluded from arbitration. The $15,000 threshold for arbitration is not arbitrary or specifically designed to favor defendants. This policy of the third-party administrator is intended to benefit consumers by allowing access to the courts for small claims. *See Jenkins*, 400 F.3d at 879 (noting that a "provision providing access to small claims tribunals was intended to benefit, not injure, consumers"). Here, plaintiffs have the option of pursuing their individual claims in civil court by limiting*385 their damages to $15,000 each or seeking a larger recovery in arbitration.

Additionally, the arbitration agreement's exclusion of foreclosure actions is not unreasonable be-

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cause our statutes give North Carolina superior courts "exclusive jurisdiction" over any action affecting the title to land located in this state. *See*N.C.G S § 43-1 (2007). Moreover, our foreclosure statutes contain provisions protecting homeowners. *E g*, *id* § 45-21.16 (2007) (outlining specific requirements for notice and hearing prior to sale); *id* § 45-21 20 (2007) (allowing satisfaction of mortgage after notice and before sale is completed), *id.* § 41-21 34 (2007) (permitting application to enjoin sale on equitable grounds).

C. Prohibition on Class Actions and Joinder of Claims

The majority affirms the trial court's conclusion that the prohibition on class actions and joinder of claims is a factor to consider in the overall unconscionability analysis The majority reasons that the prohibition hinders access to a tribunal for "cases with low damages" and benefits only the lender. This analysis ignores the facts of this case in which each plaintiff's claim is greater than $15,000 and arbitration provides an expedient forum for plaintiffs to pursue their remedies

The principal opinion states that plaintiffs' damages total less than $4,500, but this amount does not take into account accrued interest and trebling, N C.G S § 75-16 (2007), or that plaintiffs may recover attorney's fees, *id* § 75-16.1 (2007); *see* note 7 above. Moreover, the mandatory arbitration provision was only triggered in this case because each plaintiff claims damages in excess of $15,000. The "modesty" of the damages sought by plaintiffs is doubtful When federal courts have held arbitration agreements unconscionable based in part on class action prohibitions, the damages at issue were considerably less than those at issue in this case. *See, e.g*, *Dale v Comcast Corp*, 498 F.3d 1216, 1220 (11th Cir 2007) ($11 per plaintiff); *Ting v AT&T*, 319 F.3d 1126, 1134 (9th Cir.) (declaratory and injunctive relief), *cert denied*,540 U S. 811, 124 S Ct. 53, 157 L.Ed.2d 24 (2003); *see also Kristian*, 446 F 3d at 54 (damages which if trebled would range "from a few hundred dollars to perhaps a few thousand dollars" in a complex antitrust case); *Leonard v Terminix Int'l Co*, 854 So 2d 529, 535 (Ala.2002) (per curiam) (less than $500 per plaintiff); *State ex rel. Dunlap v Berger*, 211 W.Va. 549, 562, 567 S.E 2d 265, 278 ($8.46 for one named plaintiff), *cert. denied*,537 U S. 1087, 123 S.Ct. 695, 154 L.Ed.2d 631 (2002)

The trial court's conclusion that it would be unlikely that attorneys would be willing to represent plaintiffs in the absence of a class action option, while labeled a factual finding, is essentially a legal argument that has been rejected by federal courts. Federal courts of appeals have concluded that the availability of attorney's fees provides sufficient incentive for attorneys to represent clients raising claims similar to those of plaintiffs in this case. *See Jenkins*, 400 F 3d at 878 (recognizing that the availability of attorney's fees provides plaintiffs with adequate access), *Snowden v CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir.) (rejecting challenge to a class action waiver based on the plaintiffs' argument that the small amount of individual damages sought would make them unable to obtain legal representation when attorney's fees were available), *cert denied*,537 U.S. 1087, 123 S.Ct. 695, 154 L.Ed.2d 631 (2002); *Johnson v W Suburban Bank*, 225 F.3d 366, 374 (3d Cir.2000) (finding that class action waivers in arbitration proceedings do not "necessarily choke off the supply of lawyers willing to pursue claims on behalf of debtors"), *cert. denied*,531 U.S. 1145, 121 S Ct. 1081, 148 L.Ed.2d 957 (2001), *see also Livingston v Assocs Fin, Inc*, 339 F 3d 553, 559 (7th Cir 2003) (enforcing an arbitration provision specifically prohibiting class action arbitration)

Further, apart from plaintiffs' attorney's own averments, there is no evidence in the record that other attorneys would refuse to take the case of a client seeking more than $15,000 in damages.[FN11] Many cases seeking *386 damages lower than those sought here are litigated through our appellate court system. *See, e.g., Wright v. Murray*, ---N.C.App ---, ----, 651 S.E.2d 913, 914 (2007) (finding no abuse of discretion when trial court ordered $25,000 in attorney's fees following the jury's award of

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$7,000 to the plaintiff); *Dysart v Cummings,* 181 N C.App 641, 645, 640 S.E.2d 832, 835 (seeking $10,500 in damages plus costs and attorney's fees), *aff'd per curiam,*361 N.C. 580, 650 S E 2d 593 (2007) While it is uncontested that plaintiffs cannot afford to hire an attorney on an hourly basis, there is nothing in the arbitration agreement itself that precludes an attorney from taking a consumer's case in arbitration on a contingency basis. The very fact that plaintiffs retained counsel on a contingency fee basis in this matter weighs against a finding that representation would be unavailable.

> FN11. In several of its findings of fact, the trial court relies on information contained in the affidavit of plaintiffs' attorney. Reliance on the affidavit raises two concerns First, under Rule 3.7 of the North Carolina Rules of Professional Conduct, "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client." N.C. St. B Rev. R. Prof. Conduct 3.7 (Lawyer as Witness), 2007 Ann R. N.C. 717, 812 In this case, the propriety of plaintiffs' own counsel providing an affidavit concerning not merely "services rendered in [this] case" but also regarding his opinion whether it would be "feasible to pursue claims such as this on an individual basis" is questionable under the rule.

Second, defendants moved to compel discovery on matters related to litigation and arbitration costs. The trial court denied this motion. Subsequently, two days before the hearing on defendants' motion to compel arbitration, plaintiffs' counsel submitted the affidavit at issue addressing the same information counsel had refused to disclose during discovery. Defendants moved to strike this affidavit. The trial court did not rule on the motion to strike, but relied on the affidavit in its findings of fact regarding the costs of litigation. Given this reliance, at a minimum, defendants should have been given the opportunity to probe the substance of the affidavit.

VI. APPLICATION OF RECENT FEDERAL CASES

The majority upholds the trial court, which concluded that the three provisions taken together made the arbitration agreement unconscionable Implicit in this conclusion is that none of these provisions standing alone would result in unconscionability. Not only does state law not support the trial court's conclusion, but the majority's approach is inconsistent with federal decisions interpreting the FAA. As illustrated by two recent federal court of appeals cases with similar facts, when reviewing elements of an arbitration agreement that are unique to arbitration agreements, state law must defer to federal principles.

In *Jenkins v First American Cash Advance of Georgia, LLC,* the Eleventh Circuit considered whether an arbitration agreement between a consumer and a payday lender was unconscionable. 400 F 3d at 870-71. The terms of the agreement were similar to, but more strident than, those found in this case. Costs for arbitration were advanced by the lender only upon a consumer's request, and then the arbitrator had complete discretion to award attorney's fees and costs to the prevailing party, if applicable law allowed. *Id.* at 872. The arbitration agreement contained a small claims exception similar to the one in this case, with one important difference small claims decisions could be appealed to an arbitrator. *Id.*

The trial court in *Jenkins* found that the agreement was substantively unconscionable because it prohibited class actions and because it lacked mutuality of obligation in that its small claims exception would only benefit the lender. *Id.* at 876. The trial court noted that individually these provisions might be insufficient, but "considered together," they made the arbitration agreement unconscionable *Id* The Eleventh Circuit disagreed As to the class action waiver, even though none of the loans was greater than $500, *id* at 871, the appeals court con-

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cluded that the availability of attorney's fees was sufficient incentive for lawyers to represent consumers under the applicable arbitration agreement, *id.* at 878. Further, the court concluded that the class action prohibition would not have the practical effect of immunizing the lenders because the arbitration agreement permitted the consumer to vindicate all of her substantive rights. *Id* Regarding the exception allowing small claims actions to be brought in a judicial forum, the court noted that this option was equally applicable to both consumer and lender. *Id* at 879. The court found the *387 exception was intended to benefit, not injure, consumers as part of a larger Consumer Due Process Protocol developed by AAA *Id.* Moreover, the Eleventh Circuit concluded that the arbitral forum itself does not unfairly favor the lender because the arbitrator was permitted to award the consumer the full range of relief available under the applicable statute *Id* at 880.

Likewise, in *Gay v CreditInform*, the Third Circuit considered whether an arbitration agreement between a consumer and a credit repair services company was unconscionable. 511 F 3d at 374-75 The court's analysis focused on the class action waiver contained in the agreement, *id.* at 392-95, noting the "competing interests" at play: "the promotion of arbitration agreements and the protection of class actions prohibited by such agreements,"*id.* at 394. Quoting from an earlier decision, the Third Circuit observed " '[w]hatever the benefits of class actions, the FAA *requires* piecemeal resolution when necessary to give effect to an arbitration agreement' " *Id.* (quoting *Johnson,* 225 F.3d at 375 (alteration in original) (citation and internal quotation marks omitted)). The court specifically noted that state court analysis cannot focus on the uniqueness of an arbitration agreement.[FN12] *Id* It further found that such "reasoning if applied logically could result in a significant narrowing of the application of the FAA "*Id.* at 395. The Third Circuit in *Gay* concluded. "[O]ur obligation is to honor the intent of Congress and that is what we are doing. If the reach of the FAA is to be confined then Congress and not the courts should be the body to do so." *Id.*

FN12. In *Gay,* the Third Circuit specifically criticized two Pennsylvania state court decisions, one of which involved the same arbitration clause used by defendants in this case. 511 F.3d at 392-95 In *Lytle v CitiFinancial Services, Inc*, 2002 PA Super. 327, 810 A 2d 643, the Pennsylvania Superior Court vacated the trial court's order dismissing the plaintiffs' complaint and remanded for the trial court to hold a hearing on whether there existed "a business reality which precluded CitiFinancial from agreeing to be bound by the arbitration provisions" *Id.* at ¶ 44, 810 A.2d at 668. If CitiFinancial were able to prove "a compelling basis for the one-sided arbitration clause," then the trial court was to allow the plaintiffs to offer proof on the issues of costs of arbitration as contrasted to court proceedings and the feasibility of obtaining relief in the absence of a class action mechanism. *Id.* at ¶ 45, 810 A 2d at 668. The Third Circuit specifically stated that *Lytle* violated section 2 of the FAA "[t]o the extent .. that [it held] that the inclusion of a waiver of the right to bring judicial class actions in an arbitration agreement constitutes an unconscionable contract" *Gay,* at 394.

Notably, the Pennsylvania Supreme Court, when reviewing a question on certification from the Third Circuit, disavowed *Lytle's* holding: "While we believe that *Lytle* was well intentioned in its effort to guard against pernicious lending practices, our conclusion here is that it swept too broadly. Under Pennsylvania law, the burden of establishing unconscionability lies with the party seeking to invalidate a contract, including an arbitration agreement...."*Salley v Option One Mortgage Corp*, 592 Pa. 323, 347, 925 A.2d 115, 129 (2007).

These cases highlight the important principles implicated by today's decision *Jenkins,* with its similar facts, supports a conclusion that the instant arbitration agreement's terms do not cross the high bar of unconscionability. *Gay* underscores the difficulty a state court has in attempting to parse an ar-

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bitration agreement's terms under the FAA. Both decisions undercut the majority's conclusion here, which finds an arbitration agreement unconscionable based upon the very terms that make it an arbitration agreement.

VII. CONCLUSION

At its core, this case is about plaintiffs' challenge to an arbitration agreement that substitutes individual arbitration for class action litigation in court. Federal law does not permit plaintiffs to challenge this agreement simply because it designates an alternative forum for dispute resolution. *Scherk v Alberto-Culver Co*, 417 U.S. 506, 519, 94 S Ct 2449, 2457, 41 L.Ed 2d 270, 280 (1974) (recognizing that arbitration agreements are essentially forum selection clauses).

Further, under this Court's case law, a plaintiff seeking to prove a contract unconscionable must show its terms "shock the judgment of a person of common sense" and "are so oppressive that no reasonable person would make them--on the one hand, and no honest and fair person would accept them on the other." *388*Brenner*, 302 N.C. at 213, 274 S E.2d at 210. Since 1996, 68,000 loans were made containing this arbitration provision. Having considered "all the facts and circumstances of [this] particular case," I do not believe the provisions of this agreement are shocking or so oppressive that a reasonable, honest, and fair person would not offer or agree to them. I believe "[t]he bargain was one that a reasonable person of sound judgment might accept" *Id.* at 214, 274 S.E.2d at 211. Beyond that, we are not allowed to inquire " 'as to whether the contract was good or bad, whether it was wise or foolish.' " *Id.* (citation omitted).

Because plaintiffs have failed to prove procedural and substantive unconscionability as required by *Brenner*, I do not believe this case presents the landmark occasion for invalidating a bargain due to unconscionability. Justice Oliver Wendell Holmes warned of cases such as this:

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.
>
> *N. Sec. Co v. United States*, 193 U.S. 197, 400-01, 24 S.Ct. 436, 468, 48 L.Ed. 679, 726 (1904) (Holmes, J., Fuller, C.J., & White & Peckham, JJ., dissenting) I fear that certain "well settled principles of law" have been bent, not to straighten again. Accordingly, I would affirm the Court of Appeals.

Chief Justice PARKER joins in this dissenting opinion.

N.C.,2008.
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CIRCUIT CLERK, ST. LOUIS COUNTY

STATE OF MISSOURI
CIRCUIT COURT OF ST. LOUIS COUNTY
TWENTY-FIRST JUDICIAL CIRCUIT

DEQUAE WOODS,
Plaintiff,
v.

QC Financial Services, Inc. dba Quik Cash,
Defendant.

December 31, 2007

Case No. 06-CC-004072-V-CV

Division: 18

ORDER AND JUDGMENT

Before this Court is Defendant's Motion to Dismiss Plaintiff's case and to compel Plaintiff to engage in individual arbitration. Count I of Plaintiff's Petition seeks a declaratory judgment that Defendant's arbitration clause is unconscionable.

Plaintiff filed a Motion to Stay Defendant's Motion to Dismiss, asserting that Missouri law required evidence to determine if the arbitration clause at issue was unconscionable. This Court granted Plaintiff's Motion to Stay and gave the parties six months to conduct discovery. On June 28-29, 2007, Plaintiff and Defendant presented evidence to this Court in a two-day hearing on the record. At the conclusion of the hearing, the Court granted the parties two weeks from the date of the receipt of a transcript of the hearing to file briefs. Both parties filed post trial briefs on September 21, 2007, at which point the Court took the matter under submission.

Defendant is a payday lender doing business as Quik Cash (hereinafter "QC"), and Plaintiff is Dequae Woods. Although this Court will weigh evidence to determine whether or not QC's arbitration clause is unconscionable, the underlying allegations of QC's wrongful conduct, as outlined in Counts II – VII of Plaintiff's petition are taken as true when considering a Motion to Dismiss In her Petition, Plaintiff has alleged that QC has engaged in a number of violations

of Missouri statutes governing payday lenders, and that Petition seeks class certification on behalf of those similarly situated to Plaintiff.

QC's mandatory arbitration cause included the following language:

> **(C) YOU ARE WAIVING YOUR RIGHT TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY, AND/OR TO PARTICIPATE AS A MEMBER OF A CLASS OF CLAIMANTS, IN ANY LAWSUIT FILED AGAINST US AND/OR RELATED THIRD PARTIES.**
>
> 3. Except as provided in paragraph 6 below, all disputes including any Representative Claims against us and/or related third parties shall be resolved by binding arbitration only on an individual basis with you. **THEREFORE, THE ARBITRATOR SHALL NOT CONDUCT CLASS ARBITRATION; THAT IS, THE ARBITRATOR SHALL NOT ALLOW YOU TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY FOR OTHERS IN THE ARBITRATION.**

At the June, 2007 hearing, Plaintiff has specifically challenged the legal effect of QC's arbitration clause, arguing that it is unconscionable. Defendant counters that the arbitration clause at issue is enforceable under Missouri law. Defendant contends that there is a presumption in favor of arbitration and that, because Plaintiff signed loan documents multiple times, she is bound by the contract. Defendant points out that both QC and the Plaintiff gave up the right to go to court, other than to small claims court. Defendant points out that both parties gave up their rights to file class actions, that QC has obligated itself to pay some of the fees associated with arbitration on behalf of the Plaintiff, and that QC would not seek reimbursement of such fees even if claimants lose their claims in arbitration.

Plaintiff asserts that the arbitration clause should be scrutinized under general Missouri contract law. Plaintiff directs this Court to *Whitney v. Alltel*, where the Court held that "[A]n arbitration clause that defeats the prospect of class-action treatment in a setting where the

practical effect affords the defendant immunity is unconscionable." 173 S.W.3d 300, 309 (Mo. App. W.D. 2005). Plaintiff contends that the evidence in this case demonstrates that the QC arbitration clause has immunized QC while preventing Missouri consumers from pursuing their statutory rights. Specifically, Plaintiff asserts that QC's arbitration clause:

1. strips consumers of their specific statutory right to a class action pursuant to §407.025 RSMo;
2. prevents consumers from learning that their rights have been violated (because it eliminates the possibility of class action notices);
3. makes it difficult for individuals to find legal representation due to the small damages associated with individual claims against QC;
4. removes the incentive for individual litigants to pursue their claims in the face of uncertainty and expense of litigating what amount to complex commercial cases;
5. produces gross inefficiencies that destroy the benefits attributed to arbitration;
6. is so one-sided that a court cannot in good faith enforce it as a matter of substantive unconscionability; and
7. removes all incentives for QC to comply with Missouri law because QC's arbitration clause insulates QC from the effects of negative precedent and class actions.

Plaintiff also asserts that there are additional facts in this case weighing in favor of a finding that QC's arbitration clause is unconscionable. Plaintiff notes that QC has filed lawsuits against numerous customers in Missouri, despite the fact that QC's arbitration clause prohibits such activity. Plaintiff also notes that a recent decision by the U.S. District Court located in Arizona, *Cooper v. QC Financial Services, Inc.*, considered the same arbitration clause at issue in this matter, the same Defendant and defense counsel, a similar plaintiff, and a similar legal

standard. The *Cooper* Court struck QC's provisions prohibiting class arbitration and sent that case to the arbitrator with instructions to "determine whether Plaintiff satisfies the requisite criteria for this mater to proceed as a class arbitration." 2007 WL 974100, *21 (D. Ariz).

This Court finds the analysis in *Cooper* to be persuasive. Coupled with the test laid out in *Whitney* and the similar tests employed by courts throughout the nation, *Cooper* establishes that the arbitration clause at issue impermissibly immunizes QC from the realistic possibility of meaningful legal accountability for alleged illegal activities. This Court holds that it is unconscionable for a business to prohibit consumer class actions when the case involves damages that are relatively small and when the practical result is immunity for the Defendant.

I. DISCUSSION

A. This Court Must Decide the Validity of the Arbitration Clause

Defendant contends that Plaintiff challenged the contract as a whole and that, therefore, the issue of the validity of the contract (and the arbitration clause) is for an arbitrator. Plaintiff asserts its challenge is to the arbitration clause alone.

The law is settled. If a Plaintiff challenges a contract as a whole, asserting that the arbitration clause is invalid because it is contained in a void contract, the question of the validity of the contract, and therefore the arbitration clause, is one for the arbitrator. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 US 440, 445-446 (2006). It is a question for the Court, however, when a Plaintiff challenges an arbitration clause by asserting that the clause fails under general state contract law. *Id.; see also* 9 U.S.C.A. § 2; *Swain v. Auto Servs., Inc.*, 103, 107 (Mo. App. E.D. 2003) (holding that "generally applicable state law contract defenses, such as . . . unconscionability may be used to invalidate arbitration agreements without contravening the FAA").

In this matter, it is clear that Plaintiff's challenge is to the arbitration clause, not the contract as a whole. Plaintiff spent two days discussing the arbitration clause in the June 28-29 hearing, never raising any concerns about the validity of the underlying contract. Similarly, Plaintiff's Petition seeks a declaratory judgment *that the arbitration clause is unconscionable* due to terms contained within that arbitration clause. For example, Plaintiff's first allegation, ¶17, states, "There is a present controversy between Defendant and Plaintiff (and class members) because Defendant has placed an arbitration clause prohibiting class actions in its loan contract and Plaintiff (and class members) contends it is unenforceable and unconscionable under state law."

Because this Court has a duty to consider the validity of an arbitration clause, the proper standard for doing so must be ascertained. Under the Federal Arbitration Act, 9 U.S.C.A. §2 (hereinafter "FAA"), an arbitration clause is enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.A. §2. The United States Supreme Court explained this language in *Perry v. Thomas*, stating that "state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. 482 U.S. 483, 492, (1987). This standard requires this Court to treat arbitration clauses just as it would any other contract clause under Missouri law.

B. Unconscionability

If a contract or provision therein is unconscionable, it is unenforceable. Unconscionability is a general contract law defense. *See generally* 9 U.S.C.A. § 2; *Cardegna*, 546 U.S. 440. There are two types of unconscionability, procedural and substantive. *Bracey v. Monsanto Co.*, 823 S.W 2d 946, 950 (Mo. banc 1992). There is a "balancing between the

substantive and procedural aspects . . . if there exists gross procedural unconscionability then not much is needed by way of substantive unconscionability." *Id.* The same sliding scale will be applied if there is "great substantive unconscionability but little procedural unconscionability." *Id.* Under Missouri law, substantive unconscionability alone may be enough to invalidate offensive clauses. *See Vincent v. Schneider,* 194 S.W.3d 853 (Mo. en banc 2006). In this case, however, this Court finds that the QC contract was both procedurally and substantively unconscionable.

"[A]s with all contracts, courts seek to enforce the reasonable expectations of the parties garnered not only from the words of a standardized form imposed by its proponent, but from the totality of the circumstances surrounding the transaction." *Hartland Computer Leasing Corp v. Insurance Man, Inc.*, 770 S.W.2d 525, 527 (Mo.App. E.D. 1989); see also *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300 (Mo. App. W.D. 2005). "Because standardized contracts address the mass of users, the test for 'reasonable expectations' is objective, addressed to the average member of the public who accepts such a contract, not the subjective expectations of an individual adherent." *Swain,* 128 S.W.3d at 107 (quoting *Hartland Computer Leasing Corp.*, 770 S.W.2d at 527-28). "Only such provisions of the standardized form which fail to comport with such reasonable expectations and which are unexpected and unconscionably unfair are held to be unenforceable." *Hartland Computer Leasing Corp.*, 770 S.W.2d at 527; *see also Smith v. Kriska,* 113 S.W.3d 293, 298 (Mo. App. E.D. 2003). The position of QC, that the Court in considering the totality of the circumstances of the transactions to see if the clause is unenforceable is to look only to the totality of the circumstances of the transactions entered into by Plaintiff and only consider the circumstances surrounding Plaintiffs contacts not QC's other

customers. However QC does not cite any authority for this approach. This Court is bound to follow the analysis of Swain infra quoting Hartland infra in determining unconscionability.

1. Procedural Unconscionability

"[P]rocedural unconscionability concerns the contract formation process, and focuses on high pressure exerted on the parties, fine print of the contract, misrepresentation, or unequal bargaining position." *Funding Sys. Leasing Corp. v. King Louie Int'l, Inc.*, 597 S.W.2d 624, 634 (Mo. App. W.D. 1979). "Adhesion contracts usually involve the unequal bargaining power of a large corporation versus an individual and are often presented in pre-printed form contracts." *Swain*, 128 S.W.3d at 107. Adhesion contracts are not necessarily unconscionable. While involving aspects of procedural unconscionability, such contracts "are not 'inherently sinister and automatically unenforceable.' " *Id.* (quoting *Hartland Computer Leasing Corp. v Insurance Man, Inc.*, 770 S.W.2d 525, 527 (Mo.App. E.D.1989)). Just as it does with substantive unconscionability, a court applies the "reasonable expectations" test to determine if, under the totality of the circumstances, a clause is procedurally unconscionable. *See Whitney*, 173 S.W.3d at 310).

However, a point of contention arises among the parties regarding the applicable perspective from which a court should measure procedural unconscionability. QC contends that this Court should consider Ms. Woods own situation and her subjective understanding of the arbitration clause when considering unconscionability. QC contends that she was not hurried, that she could have left the store at any time, and that she returned to the store and signed a contract to renew an existing payday loan even after she had filed her claim against QC. QC contends that the repeated visits by Plaintiff are grounds for enforcing the clause. QC cites no authority for this type of analysis. It is also clear that a Defendant cannot exculpate itself from

liability unless the language is clear and unambiguous. *Alack v. Vic Tanny Intern. of Missouri, Inc.*, 923 S.W.2d 330, 337-338 (Mo. 1996). Here, because this Court concludes the clause does serve to immunize Defendant, any exculpatory language cannot be enforced against the Plaintiff.

Plaintiff asserts that the proper test is an *objective* one, where this Court should consider the "reasonable expectations of the average consumer." Plaintiff points out that the objective "reasonable expectations" test is the only approach which provides certainty for business and individuals regarding the enforceability of mass-produced contracts. Plaintiff points out that to hold otherwise, to look only to subjective understanding of individual customers, would be to invite individual, potentially conflicting, holdings regarding the same arbitration clause. Although the clause could be enforceable against Ms. Woods, it may well be unenforceable against the next plaintiff to challenge the clause.

This Court notes that Missouri courts and courts from other jurisdictions have consistently held that arbitration clauses are enforceable or unenforceable based upon an objective test and that the courts should not look to the subjective understanding of individual consumers. Further, in Missouri, the appropriate test is not in question. Court have consistently held that "because standardized contracts address the mass of users, the test for 'reasonable expectations' is objective, addressed to the average member of the public who accepts such a contract, not the subjective expectations of an individual adherent." *Swain*, 128 S.W.3d at 107 (quoting *Hartland Computer Leasing Corp.*, 770 S.W.2d at 527-28). Applying this "reasonable expectations" standard, the QC arbitration clause is procedurally unconscionable.

The evidence demonstrates that QC entered into approximately 2.8 million loan transactions involving about 400,000 customers over the last five years. QC admits it has never negotiated its arbitration clause. QC admits that the arbitration clause is a form contract. This

Court disagrees with QC's assertion that the average consumer might have bargaining power comparable to QC. QC is a large, national company that does business with individuals who borrow money at interest rates exceeding 400%. The money is borrowed against the borrower's next paycheck. When a large corporation does business with an individual consumer, there is almost always disparity in bargaining power. In the context of these facts, the disparity is all the more apparent.

QC also asserts that its clause is not in fine print, however, the evidence presented demonstrates otherwise. Plaintiff's expert, Dr. Hochhauser, testified that the clause contained more than 1,300 words made to fit onto one page. The font was approximately "8" and the spacing of the lines were so close that words from adjacent lines touched and an optical scanner was unable to make out the characters. Dr. Hochhauser predicted that people would have a difficult time reading the font and that, even if they could physically read the words, the average consumer was unlikely to be able to process and understand the document.

Evidence from the deposition of Darren Walrod, the corporate representative of QC, demonstrates that he re-read an entire line before noticing that he had re-read it, apparently because of the size and spacing of the font. Mr. Anderson, the president of QC and the individual who decided to implement QC's arbitration clause, demonstrated a general lack of understanding of the clause. Plaintiff also provided this Court with a version of the arbitration clause that is double-spaced, 12 point Times New Roman font. That physically readable version of the clause is six pages long.

Clauses are to be written to communicate information, not conceal it. The QC arbitration fails the test. It is a non-negotiable, take-it-or-leave-it, form contract in fine print. It is presented

to customers who are unlikely to have the ability to understand it. The clause is, considering the totality of the circumstances, procedurally unconscionable.

2. Substantive Unconscionability

Substantive unconscionability deals with an undue harshness in the contract terms themselves. *Whitney*, 173 S.W.3d at 308. Courts in Missouri consider the reasonable expectations of the average consumer when evaluating a form contract and consider the totality of the circumstances when weighing evidence. *Id.* at 309. A review of cases in Missouri and around the country demonstrates that this generally involves considering the real world effects of the clause in question. *See e.g. Muhammad v. County Bank of Rehoboth Beach*, 912 A.2d 88 (N.J. 2006); *Discover v. Superior Court*, 113 P 3d 1100 (Cal. 2005); *Kinkel v. Cingular Wireless*, 223 Ill.2d 1 (Ill. 2006); *and Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. 2007).

At the outset, the Court notes that both Plaintiff and Defendant provided this Court with extensive lists of cases considering class waivers. A detailed discussion of each is not necessary. There is a split between courts that hold that class action waivers will not prevent individuals from vindicating their statutory rights and those courts which assert that class action waivers constitute *de facto* immunity clauses for defendants. Although Defendant asserts that Plaintiff's position is the minority view, this is a question of perspective. In the last three years, many State Supreme Courts have struck class waivers. These courts, beginning with the California Supreme Court in *Discover Bank v. California Superior Court* and including the July 2007 decision of *Scott v. Cingular Wireless*, echo reasoning that had some of its earliest roots in *Whitney v. Alltel.*

This Court, like the *Whitney* Court, is persuaded by the line of cases holding the clause is unconscionable:

> when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money

Discover Bank v. Superior Court, 36 Cal.4th 148, 162 (Cal. 2005); *Schwartz v. Alltel Corp.*, 2006-Ohio-3353 ¶ 36, 2006 WL 2243649 (Ohio Ct.App.); Scott, 161 P.3d 1000, 1005. To hold otherwise would allow a company to continue imposing "its improper and deceptive charges *ad infinitum* since none of its customers would have a practical remedy to bring about a stop to the conduct." *Whitney*, 173 S.W.3d at 310. As such, this would allow a Missouri company to grant itself a "get out of jail free card while compromising important consumer rights." *Szetela v. Discovery Bank*, 97 Cal. App. 4th 1094, 1101 (Cal. App. 4. Dist. 2002).

In this matter, Plaintiff contends that class waiver is unconscionable for a number of reasons. First, Plaintiff asserts that the clause serves as an obstacle which prevents consumers from learning that their rights may have been violated. This line of thinking, that class notice is an important function of class actions, is in line with the reasoning of multiple courts. In *Muhammad*, the Court noted:

> Moreover, without the availability of a class-action mechanism, many consumer-fraud victims may never realize that they may have been wronged. . . . When they are being charged an excessive interest rate or a penalty for check bouncing, for example, few know or even sense that their rights are being violated. *Muhammad v. County Bank of Rehoboth Beach, Delaware*, 2006 WL 2273448, 9 (N.J. 2006).

In this matter, Plaintiff introduced evidence that QC does not notify its customers of individual claims that are filed and that it does not intend to do so in the future. Plaintiff, via expert Dale Irwin, a consumer attorney, introduced evidence that class notices often serve as the only way that a consumer can learn of violations that are not intuitively sensed by consumers. Given the complexity of payday lending law, consumers are unlikely to be familiar enough with

their legal rights to know whether or not QC has violated the law. Even if it were established in an individual arbitration that QC's actions violated Missouri law, the absence of class notice would keep other victims from learning of the possibility that they, too, were victimized.

Plaintiff also asserts that even if an individual were to learn of a potential violation by QC, it would be difficult for them to find adequate legal representation due to the limited value of the claims. Defendant counters that because an attorney could recover attorney fees under the arbitration clause, there is sufficient incentive for attorneys to take on cases like the Plaintiff's. Defendant's was presented by Defendant in *Cooper*. In *Cooper*, the Court noted that "there is no indication that attorney fees are an adequate substitute for the class action mechanism." *Cooper*, 2007 WL 974100 at 18; *Muhammad*, 2006 WL 2273448 at 7; *Kristian v. Comcast Corp.*, 446 F.3d 25, 59 (1st Cir. 2006).

Evidence in this case points to this same conclusion. Experts Irwin, Brown, Ammann and Rossman, all of whom are experienced consumer attorneys, testified that they do not take cases involving small damages under the assumption that courts will award adequate attorneys' fees. Although the threshold amount for a "small damages" case differed from expert to expert, it seems clear that when a case involves potential damages of less than a few thousand dollars, most attorneys are not willing to take such case on a contingent basis nor will their clients pay hourly rates, which would quickly exceed any potential recovery.

Plaintiff asserts that in the improbable case where a customer learns of a violation and finds representation in a small damages case there is still the possibility that by requiring the customer to engage in individual arbitration there may not be adequate incentive for the litigant to pursue the claim. In *Muhammad*, the court noted "The class-action mechanism also overcomes the problem that small individual recoveries may fail to provide an adequate

incentive for a litigant to investigate a claim or bring suit even if the litigant could secure representation." 2006 WL 2273448 at 9; *see also Leonard v. Terminix*, 854 So.2d 529, 539 (Ala. 2002); *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 885-886 (Pa. Super. 2006).

Plaintiff asserts that any individual litigant would be unlikely to pursue a claim in individual arbitration because, even if QC advanced the basic arbitration fees, the consumers would still have to compensate an attorney, miss work, and undergo all of the normal stresses of a legal claim—things they would not have to do if they were class members of a class action. Plaintiff asserts that the "costs" of arbitration, in terms of money, time and stress, would often exceed the potential recovery. As Mr. Rossman testified in his deposition, one of the primary benefits of a class action is that it spreads these costs among a class, allowing the members of that class to avoid most of the difficulties of a legal action while still obtaining access to justice.

The evidentiary record supports Plaintiff's position that individual attorneys are unlikely to take cases like the Plaintiff's and individual litigants are unlikely to pursue such claims based on the costs involved. Perhaps the most compelling evidence is statistical. QC has dealt with 400,000 customers in Missouri in the last five years and engaged in about 2.8 million transactions, but never had to defend a customer claim in a court of law or in an arbitration. Although QC asserts that this is because it abides by the law and that it effectively resolves customers disputes, the Court is skeptical that this can explain the absolute absence of legal disputes. It is more likely that lack of notice, coupled with the difficulty in finding legal representation and the disincentives for individuals to pursue their claims alone, are the explanations for this absence of legal disputes between QC and its customers.

Plaintiff points out that *Whitney*, in adopting a test first set out by the U.S Supreme Court, notes that an arbitration clause is measured by whether it would allow claimants to

vindicate their statutory rights in the arbitral forum. 173 S.W. 3d at 311. Plaintiff asserts that in addition to the reasons referenced above, there is a more fundamental reason for holding that QC's arbitration clause is unconscionable. Plaintiff has brought some of its claims under the Missouri Merchandising Practices Act, RSMo. §407.010 *et seq.* (hereinafter "MPA"). The plaintiff argues that the MPA specifically vests consumers with the right to the class mechanism at §407.025.2. Plaintiff argues that this defeats any assertion by Defendant that taking away a class action is taking away a "procedure" and not a right.

A Michigan federal court considered the same argument and held:

> Further, even if the waiver of judicial forum was not substantively unconscionable with respect to TILA claims, under the Michigan Consumer Protection Act, the availability of class recovery is explicitly provided for and encouraged by statute. Because the arbitration agreement prohibits the pursuit of class relief, it impermissibly waives a state statutory remedy. *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F.Supp.2d 1087, 1105 (W.D. Mich. 2000)(internal citations omitted).

In this matter, it is clear the MPA allows class actions to be brought under §407.025.2. This right is in addition to the class action procedure provided by Missouri Rules of Civil Procedure 52.08. By requiring its customers to sign a contract that takes away their rights to pursue their claims via the class mechanism, QC has thwarted the intent of the MPA and Missouri consumer laws. This violates the above-mentioned fundamental tenet that an arbitral forum is valid only when it allows litigants to vindicate their statutory rights.

Plaintiff asserts that QC's prohibition of class arbitrations defeats the very purpose of arbitration by producing gross inefficiencies instead of streamlined procedures. Plaintiff asserts that there is no reason to believe that the purported efficiencies of arbitration would be lost in a class arbitration setting. Plaintiff points out that Defendant asserted (in its answers to interrogatories and subsequent depositions) that the clause was included to promote "efficiency,"

but that Defendant has failed to explain how requiring consumers cases to be resolved one-by-one in separate arbitration, which have no precedential value on future arbitrations, would efficiently resolve the alleged claims of Plaintiff and putative class members.

This Court concurs with Plaintiff's assertion that individual arbitrations are far less efficient than class arbitrations; holding thousands of individual arbitrations rather than a single class arbitration would frustrate the goals of efficiency QC purports to advance. At his deposition, QC's President indicated that he implemented the arbitration clause without consulting anyone besides counsel. He could not articulate the differences between court proceedings and arbitration and he admitted he knew little about either. This testimony conflicts with QC's assertion that the arbitration clause promoted efficiency and lower costs. This Court takes note, as have others, that the only "efficiency" promoted by a class waiver is the reduction in total claims due to the chilling effect on dispute resolution. *See e.g. Muhammad,* 2006 WL 2273448 at 9-10; *Cooper, Vasquez,* 4 Cal. 3d at 809; *Kinkel v Cingular Wireless,* 223 Ill. 2d 1, 37-38 (Ill. 2006); *Sprague v. Household Intern,* 473 F.Supp.2d 966, 973 (W.D. Mo. 2005). As her sixth point, Plaintiff contends that the QC arbitration clause is entirely one-sided. Plaintiff argues that QC has "given up nothing, but gained absolute immunity." QC counters that it obligated to pay the arbitration fees of Plaintiff and that it, like Plaintiff, has given up its right to class actions and general access to court. Courts have been skeptical of defendants' contentions that they have given up the right to file a class action. In *Sprague v. Household International,* despite the fact that plaintiff was not bringing a class action, the court noted that class waivers were "one-sided in [their] practical effect" and "weigh[ed] heavily in favor of a finding of substantive unconscionability." 473 F.Supp.2d 966, 973 (W.D. Mo. 2005). .

In this matter, QC admitted it has never filed a class action. QC has also admitted that it filed lawsuits against its own customers, in courts other than small claims court, in violation of its obligations under the clause it drafted. Although mutuality is not required in Missouri (see *Vincent v. Schneider*,194 S.W.3d 853, 856 (Mo. banc 2006)), if a clause is so one-sided that it is fundamentally unfair, it cannot be enforced. This one-sidedness is at the heart of unconscionability analysis. Average consumers should would not reasonably expect that any contract would require them to A) lose fundamental rights, B) gain nothing, and C) immunize the party with which they are dealing.

For her final point, Plaintiff contends that QC arbitration clause removes all incentives for QC to obey Missouri law by insulating it from class actions. QC asserts that it is effectively regulated by the Missouri Division of Finance and the Attorney General's office, and that it obeys the law because it should. Courts have been skeptical of business altruism as a sufficient deterrent to the temptation to push the boundaries of the law.

> [Defendant] has essentially granted itself a license to push the boundaries of good business practices to their furthest limits, fully aware that relatively few, if any, customers will seek legal remedies, and that any remedies obtained will only pertain to that single customer without collateral estoppel effect.

Szetela v. Discovery Bank, 97 Cal. App. 4th 1094, 1101 (Cal. App. 4. Dist. 2002); *see also Scott*, 161 P.3d 1000, 1006; *Cooper*, 2007 WL 974100 at 18 (holding that the QC class waiver "insulates Defendant from the spectre of a ruling which would have precedential effect").

In this matter, there is no evidence that review by the Missouri Attorney General's office or the Division of Finance could remedy all the potential wrongs of Defendant as alleged by Plaintiff. As Mr. Rossman, expert for Plaintiff, testified at his deposition, consumer protection statutes were designed to allow private citizens to enforce the law effectively. If the private

enforcement mechanism is short circuited, there is no indication that public regulation will be a sufficient substitute. For concurring opinions see *Kinkel*, 223 Ill.2d at 27; *Cooper*, 2007 WL 974100 at 18.

This Court agrees with Plaintiff that it is important to have meaningful enforcement of the law via a mechanism that can realistically hold a defendant liable for its actions to all wronged parties, rather than at best a few. The class waiver prevents QC from facing negative decisions.

If a clause immunizes a defendant and paralyzes consumers, it is unconscionable. Here, there is overwhelming evidence this has occurred. In addition to Plaintiff's proof that the clause has stymied all litigation and arbitration, this case contains additional compelling facts for striking the class arbitration waiver, i.e. has violated its own clause by suing its customers, and QC's president is also the president of the Consumer Financial Services Association (hereinafter "CFSA"), a nationwide association of payday lenders which as pointed out by Plaintiff, CFSA hosts speakers who proudly discuss "eliminating class actions through the use of arbitration clauses."

This Court, following the test laid out in *Whitney*, cannot enforce the QC clause as written. The portions of paragraphs 2(c) and 3, which prohibit class arbitrations, are unconscionable and unenforceable.

C. **Severability**

Under Missouri law, if an offending provision can be removed, and the contract retains meaning, the contract is generally preserved. In *Vincent*, the Missouri Supreme Court struck two provisions of an arbitration clause but preserved the clause itself. 194 S W.3d 853, 861 (Mo. en banc 2006). The court applied a similar approach in *Swain* when it held that a provision

requiring arbitration in Arkansas was unconscionable but the rest of the clause survived. *Swain*, 128 S.W.3d 108, 109. This is also the route taken by the last two state Supreme Court decisions in which class arbitration waivers declared unconscionable. *See Muhammad*, 189 N.J. at 26; *Kinkel*, 223 Ill.2d at 47. The court in *Cooper* did the same. 2007 WL 974100 at 20.

Striking the class arbitration waiver will allow Plaintiff and Defendant to proceed to the arbitral forum of Plaintiff's choice (as provided in the arbitration agreement) to allow a panel of arbitrators to decide if a class should be certified.

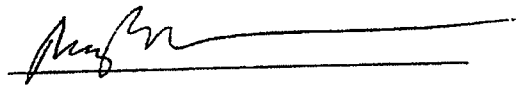
JUDGMENT

The portions of QC's arbitration clauses in paragraphs 2(c) and 3 which prohibit class arbitrations are unconscionable under Missouri law and to that extent the court finds that Count I of Plaintiff's petition seeking a declaratory judgment that those portions of QC's arbitration clause prohibiting class arbitration are unconscionable, is granted

This Court's decision does not reflect hostility for arbitration as a whole but, rather, is a result of the application of general contract laws to the clause at issue.

Although the arbitration clause at issue contains no severability clause, it is appropriate to strike the offending portions and retain the remainder of the arbitration clause. Defendant's Motion To Dismiss Plaintiff's petition is partially granted so that the matter can proceed to arbitration to determine whether Plaintiff satisfies the requisite criteria for this matter to proceed as a class arbitration. Plaintiffs claim is to be sent to the American Arbitration Association (per the Plaintiff's choice, as allowed in the arbitration clause) without any prohibition against class arbitrations. A panel of arbitrators will determine whether a class should be certified and damages awarded, pursuant to Missouri law. Costs taxed against Defendant.

SO ORDERED:



Richard C. Bresnahan

Judge, Division No.

Entered this 31st day of December, 2007.

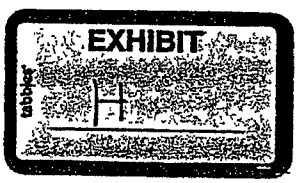
Cc: Attorneys of Record

ARBITRATION AGREEMENT
(All States Except CA)

Date: _____ VIN: _____

In this Arbitration Agreement ("Agreement"), "you" and "your refers to the customer(s) who sign(s) below. "We", "us", and Dealer refer to the Dealer signing below, and included the Dealer's employees, agents, and parent and affiliated companies (including, but not limited to, Cornerstone Acceptance Corporation) and their employees and agents. "Parties" refers to you and us. "Vehicle" refers to the automobile identified by the VIN set forth above. "Claim(s)" includes any and all disputes, claims or controversies between the Parties relating to the Vehicle or arising out of or relating to: (a) the application for and the terms of and enforceability of the sale, lease, or financing of the Vehicle, (b) purchase or terms of any warranty, service agreement, maintenance plan, paint/undercarriage/interior protection product, anti-theft etching product and warranty, GAP protection, deficiency waiver addendum, or any or other product or insurance, © any claims of breach of contract, negligence, misrepresentation, conversion, fraud, or unfair and deceptive trade practices, (d) any claim of a violation of any state or federal statute or regulation, or (e) the Vehicle's condition, warranty, workmanship, servicing, maintenance or repair. All Claims must be brought within the time allowed by the applicable statute(s) of limitation. "Contract(s)" refers to any agreement(s) between you and us regarding the sale, lease, financing, service or maintenance of the Vehicle.

Upon the request of a Party, any and all Claim(s) shall be decided in binding arbitration before the American Arbitration Association (1-800-778-7879/www.adr.org) ("AAA"). The Parties may mutually agree to use another arbitration forum and/or qualified arbitrator. Unless mutually



agreed otherwise between the Parties, any arbitration under this Agreement shall be conducted under the commercial arbitration rules of the AAA. To the extent that any Claim is deemed a "consumer dispute", the Parties agree that the fee schedule provided in the rules for consumer disputes of the AAA, if any, will apply. You can get a copy of the rules from the AAA. The arbitration hearing shall be conducted, at your option, in the federal district in which you reside or in which the Vehicle was purchased or leased.

The Parties waive the right to request arbitration for a Claim filed and maintained individually (as opposed to a class action) in your state's small claims court, if any. However, if such a Claim originally brought in a small claims court is transferred or removed to a higher state or federal trial court, the Parties reserve their right to request arbitration under this Agreement.

The Parties agree that once one of the Parties has elected to arbitrate, binding arbitration is the exclusive method for resolving any and all Claims. By entering into this Agreement the Parties are waiving their right to a jury trial and their right to bring or participate in any class action or multi-plaintiff or claimant action in court through arbitration. Until a Party entitled to do so requests arbitration under this Agreement, any party to this Agreement may proceed with all other rights and remedies they may have. Neither you nor we waive our right to request arbitration under this Agreement, even after all Parties have elected to litigate a Claim in court, in the event new Claims are asserted after the initial filing of such litigation in court.

The arbitrator shall be an attorney or retired judge. The arbitrator shall apply and be bound by governing local, state or federal law when making an award, and shall award only those damages

or other relief allowed by such governing law. Issues regarding whether a matter is arbitrable shall be made by the arbitrator. The arbitrator shall prepare a written decision stating reasoned findings of fact and conclusions of law. A party may seek entry of a judgment on the award in any court of competent jurisdiction.

If you initiate a Claim for Arbitration under this Agreement, we agree to pay that portion of the AAA's initial filing fee which exceeds the lesser of the court filing fee for the state or federal court located in the jurisdiction in which you reside....We also agree to pay up to $1500 of the arbitrator's fees, unless applicable law of the rules of the AAA require otherwise. Unless applicable law or the rules of the AAA require otherwise, the Parties agree to share equally all other costs and fees, including the arbitrator's fees in excess of $1500. Notwithstanding any other provision of this Agreement, we will also pay any amount of fees or costs that a court or the arbitrator decided we must pay in accordance with applicable law for this Agreement to be enforceable. The arbitrator deciding the Claim(s) shall have the authority to award fees, costs, injunctive or equitable relief in accordance with this Agreement and applicable law. Unless otherwise ordered by the arbitrator in accordance with applicable law or provided otherwise by applicable law law, the Parties shall be responsible for the payment of their own attorney's(') fees.

This Agreement evidences a transaction involving interstate commerce. The Parties acknowledge and agree that the Federal Arbitration Act (9 U S.C. § 1 *et seq.*) ("FAA") shall govern any arbitration under this Agreement. The arbitrator's decision shall be final and binding except for any right of appeal provided by the FAA or the rules of the AAA.

If any part of this Agreement shall be deemed or found unenforceable for any reason, the remainder of the Agreement shall remain enforceable. In the event this Agreement is found void you and we waive our respective rights to a trial by jury, if such waiver is permitted by applicable law.

This Agreement shall survive the repayment of all amounts owed by you with respect to the Vehicle. This Agreement is incorporated into and made a part of all Contract(s) as defined in this Agreement. If there is a separate arbitration agreement in any other Contract, then to the extent this Agreement is inconsistent with any such arbitration agreement this Agreement shall supersede such other arbitration agreement with respect to Claims between you and us, Unless otherwise provided by law.

- EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT.

- IF A DISPUTE IS ARBITRATE, YOU AND WE WILL EACH GIVE UP OUR RIGHT TO A TRIAL BY THE COURT OR BY A JURY.

- IF A DISPUTE US ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR A CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US, INCLUDING ANY RIGHTS TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.

- THE INFORMATION YOU AND WE MAY OBTAIN IN DISCOVERY FROM EACH OTHER IN ARBITRATION IS GENERALLY MORE LIMITED THAN IN A LAWSUIT.

- OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.

- YOUR AND OUR RIGHTS TO APPEAL OR CHANGE AN ARBITRATION AWARD IN COURT ARE VERY LIMITED.

BY SIGNING BELOW, THE PARTIES ACKNOWLEDGE THAT THEY HAVE READ AND AGREE TO THE TERMS OF THIS ARBITRATION AGREEMENT

Customer: _____ Dealer: _____

Customer: _____ Its: _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT
COUNTY OF AIKEN	)	C.A. No.: 06 CP 02-1230
Heather Herron, et al., Plaintiffs, vs. Dick Dyer & Associates, Inc., et al., Defendants.	)	**SECOND REPLY MEMORANDUM IN SUPPORT OF DEFENDANT CENTURY BMW'S MOTION TO COMPEL ARBITRATION**

COPY
ORIGINAL FILED
FEB 25 2008
AIKEN COUNTY
CLERK OF COURT

SECOND REPLY MEMORANDUM IN SUPPORT OF CENTURY BMW'S MOTION TO COMPEL ARBITRATION AND TO DISMISS CLAIMS

Plaintiff Christine Watts's Second Supplemental Memorandum in Opposition to Century BMW's Motion to Compel Arbitration is telling for what it conveniently omits. It does not mention that (1) the F&I manager never told Michael and Christine that signing the arbitration agreement was required to purchase a car, (2) the F&I manager never pressured them to sign the agreement, (3) they had full opportunity to read the agreement and would have understood it had they read it, (4) the agreement was perfectly readable, (5) they were in a rush to leave the dealership, and (6) Century BMW does not require a customer to sign the arbitration agreement to purchase a vehicle. Moreover, plaintiffs disregard well-established South Carolina law that a party has a duty to read an agreement before signing it. As for the agreement itself, the majority of cases addressing class action waivers in arbitration agreements, including the only two decisions with binding authority on this Court, have found them to be enforceable.

FACTS

Christine Watts's opposition to Century BMW's motion to compel arbitration relies on numerous and substantial distortions of the record, including:

- "The Wattses say they were presented with a big packet of documents containing flags indicating where the Wattses were supposed to sign." Pl.'s Second Supp. Memo. at 2.[1]

- "The Wattses were led to believe that they had to sign all of the documents in the packet in order to get the car." Pl.'s Second Supp. Memo. at 4.[2]

- "[T]he arbitration agreement was presented on a take-it-or-leave-it-basis . . . ." Pl.'s Second Supp. Memo. at 5. "[T]he arbitration agreement is presented as mandatory." Pl.'s Second Supp. Memo. at 6.[3]

- "The vehicle . . . was needed to get back and forth from work." Pl.'s Second Supp. Memo. at 7.[4]

- "The agreement was hastily presented for the Wattses' signatures." Pl.'s Second Supp. Memo. at 7.[5]

- The Plaintiffs can be dismissed as a "twenty-four year old girl" and a "garage door salesman." Pl.'s Second Supp. Memo. at 2.[6]

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[1] Michael testified that he was not given a large stack of documents and said nothing about flags. Michael Dep. 51:4-6.

[2] Michael and Christine rejected numerous additional proposed agreements, including service and financing contracts, and were never told they had to sign the arbitration agreement. Michael Dep. 41:3-45:9, 54:6-9; Christine Dep. 47:12-19.

[3] Michael and Christine were never told they had to sign the arbitration agreement. Michael Dep. 54:6-9; Christine Dep. 47:12-19. Century BMW does not require a customer to sign the arbitration agreement to purchase a vehicle and has in fact had customers not sign the arbitration agreement and still purchase vehicles. Michael Dep. 54:6-9; Christine Dep. 47:12-19; Bishop Dep. 22:24-23:10, 86:4-88:5.

[4] Christine had a perfectly operable vehicle before purchasing the 2004 BMW Z4 convertible in June 2005. Christine Dep. 59:24-60:10.

[5] It was Christine and Michael who were eager to leave the dealership as quickly as possible and the manager put no pressure on them to sign the documents. Michael Dep. 50:1-14, 53:13-18; Christine Dep. 40:19-23, 46:18-22. Christine's memorandum cites to her affidavit, rather than the deposition transcripts, because the testimony contradicts her affidavit and confirms that any rush to sign was self-imposed. *Compare* Christine Watts Affid. ¶ 4 *with* Michael Dep. 50:1-14, 53:13-18; Christine Dep. 40:19-23, 46:18-22.

[6] Christine is a highly trained auditor with a bachelor's and master's degree in accounting. Christine Dep. 9:10-14:2. Michael is a sales manager with prior experience managing forty-five employees. Michael Dep. 15:19-18:1.

- The General Manager of Century BMW's statement that arbitration is a method to resolve disputes without having to go to court is somehow misleading because it omits that the arbitration agreement waives statutory remedies.[7]

Rather than relying on counsels' competing characterizations of the record, we invite the Court to read in their entirety the relatively short deposition transcripts, which are attached to both supplemental memoranda. Then, the Court can draw its own conclusions.

ARGUMENT

I. Michael and Christine Watts Cannot Avoid Enforcement of The Agreement They Signed By Claiming They Did Not Read It and It Was Never Explained to Them.

The Wattses' fundamental argument that they can avoid the legal consequences of executing agreements by failing to read the agreements before signing them turns nearly a century of South Carolina precedent on its head. In South Carolina, every contracting party has a duty to read an agreement before signing it. *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34 (1986) (citing *J.B. Colt Co. v. Britt*, 123 S.E. 845 (1924)). Consonant with that duty, a party who is capable of reading an agreement but signs it without reading it is "bound by the terms thereof." *Sims v. Tyler*, 276 S.C. 640 (1981). In other words, a party cannot avoid the effect of an agreement by claiming he did not read it, *Regions Bank v. Schmauch*, 354 S.C. 648 (S.C. Ct. App. 2003), because South Carolina courts will "not protect those who, with full opportunity to do so, will not protect themselves." *Britt*, 123 S.E. at 848.

South Carolina precedent also rejects Christine's attempt to blame Century BMW for her asserted failure to understand the agreement because Century BMW supposedly did not explain

[7] Arbitration *is* a method of resolving disputes without having to go to court, and the arbitration agreement waives no statutory or common law remedies. Moreover, whatever the General Manager might hypothetically say to other customers has no relevance to the Wattses, who claim that dealership employees provided no explanation—misleading or otherwise—of the arbitration agreement to them.

the agreement to her. The law imposes no duty "to explain to an individual what he could learn from simply reading the document." *See Citizens & Southern Nat'l Bank v. Lanford*, 313 S.C. 540, 545 (1994); *Regions Bank*, 354 S.C. at 664. As long as a party had the ability and opportunity to read the agreement, he is bound by his signature. *See Sims*, 276 S.C. at 643.

Here, any failure to understand the agreement was caused by the Wattses' failure to read it. Michael testified that the agreement was readily identifiable as an arbitration agreement and perfectly readable. Michael Dep. at 51:14-52:21. They could have read the documents but chose not to because they were in a rush to leave the dealership as quickly as possible. Michael Dep. 50:1-14, 53:13-18; Christine Dep. 40:19-23, 46:18-22. As a result, they are bound by their signatures.

Christine goes a step further by asserting—three years after signing the agreement—that because the Wattses did not read the agreement, there was no meeting of the minds and, therefore, no contract was formed. Pl.'s Supp. Memo. at 12-13. If this argument is accepted, a party would have an enormous incentive not to read any agreement and then at some point after the fact—upon deciding she did not like some of the terms—the party could then void the contract by claiming there was no meeting of the minds. How could consumer or business transactions proceed if parties could later attempt to invalidate agreements by claiming they did not read them? Under Christine's theory, the contract for the purchase of the vehicle itself is void because she claims to have not read that agreement as well. Christine Dep. at 43:20-22.

As long as Michael and Christine had the ability and opportunity to read the arbitration agreement—a fact they do not contest—South Carolina law binds them to their signatures.

II. The *Simpson* Decision is Distinguishable Because Michael and Christine Did Not Lack a Meaningful Choice and the Agreement Did Not Contain Oppressive and One-sided Terms.

Simpson v. MSA of Myrtle Beach, 373 S.C. 15 (2007), does not support invalidating the Wattses' agreement to arbitrate because Michael and Christine had a meaningful choice in signing the agreement and the agreement does not contain any oppressive and one-sided terms. Like the argument that a two-seater German luxury convertible sports car is somehow a "necessity" for Christine, the argument that "the facts in this case mirror those in *Simpson*" must have been written with tongue firmly planted in cheek. Although plaintiffs' counsel had Christine sign an affidavit a week after the *Simpson* decision parroting (virtually verbatim) the language of that decision and claiming that exactly what happened in the *Simpson* case had miraculously happened to her, the depositions demonstrated that the Wattses' transaction was nothing like the *Simpson* transaction.

Simpson Facts	Watts Facts
MEANINGFUL CHOICE	
The clause is a contract of adhesion; "[n]either party disputes that the contract . . . was an adhesion contract." 373 S.C. at 27.	**The agreement is not a contract of adhesion;** the F&I manager never told Christine and Michael that the arbitration agreement was mandatory. Christine Dep. 47:16-19; Michael Dep. 54:6-9. Century BMW permits customers to buy cars even if they refuse to sign the agreement. Bishop Dep. 22:24-23:10, 86:4-88.5.
The contract was **presented on a take-it-or-leave-it basis**. *Id.* at 26-27.	The agreement was **not presented on a take-it-or-leave-it basis** because the F&I manager never said they had to sign it. Christine Dep. 47:16-19; Michael Dep. 54:6-9.
Simpson "**did not possess the business judgment** necessary to make her aware of the implications of the arbitration agreement." *Id.* at 27.	Christine is an **auditor, trained to examine documents carefully, with a master's degree in accounting**. Christine Dep. 9:10-14:2, 60:11-61:7.
Simpson apparently was **unaccompanied** during her purchase. *Id.*	Christine was **accompanied by her father,** who had purchased twelve vehicles from dealerships in his lifetime. Michael Dep. 16:1-21:2.
The contract was **"hastily" presented** for her signature. *Id.*	**Christine and Michael were eager to leave the dealership as soon as possible** and any haste to sign

	the documents was solely caused by their self-imposed rush. Michael Dep. 50:1-14, 53:13-18; Christine Dep. 40:19-23, 46:18-22.
The vehicle was a necessity. *Id.*	Christine admits **she did not need to buy a luxury convertible** and she could have continued driving her Mitsubishi Montero to and from work. Christine Dep. 59:24-60:10.
The clause was inconspicuous; it is written entirely in small print and embedded within fifteen other paragraphs. *Id.* at 27-28.	**The agreement was conspicuous** as Michael admits the stand-alone agreement, with portions in all capital letters and bolded, is readily identifiable as an arbitration agreement and is perfectly readable. Michael Watts Dep. 51:14-52:21.
NO OPPRESSIVE AND ONE-SIDED TERMS	
The clause limits statutory remedies, precluding "punitive, exemplary, double, or treble damages." *Id.* at 28-29.	**The agreement does not limit statutory remedies** as the arbitrator has the authority to award fees, costs, injunctive and other equitable relief, and any damages allowed under the governing law. Ex. 1 (Watts Arbitration Agreement).
The clause violates the Dealers Act, preventing "Simpson from receiving mandatory statutory remedies to which she may be entitled . . . [under] SCUTPA and [the] Dealers Act." *Id.* at 29-30.	**The agreement does not violate the Dealers Act** as the Wattses are not prevented from receiving any statutory remedies under the statute. Ex. 1.
The clause does not address attorneys' fees and costs. *Id.* at 20.	**Under the agreement, attorneys' fees and costs are recoverable** in accordance with applicable law. Ex. 1.
The clause lacks mutuality of remedy because the dealer is not required to submit certain claims to arbitration, even though the clause mandates arbitration of all customer claims. *Id.* at 31.	**The agreement has mutuality of remedy** as either party can demand arbitration of any dispute and no judicial fora are reserved for the Dealer. Ex. 1.
The clause provides no right to forego arbitration. *Id.* at 20.	**The agreement provides a right to forego arbitration** by bringing an action in small claims court. Ex. 1.
The filing fees are paid by the party initiating arbitration. *Id.* at 20.	If a customer initiates the action, the **dealer pays any amount in excess of what the customer would have paid to file the case in court.** Ex. 1. The agreement is also subject to the AAA rules, which require the dealer to pay any arbitrator's fees over $125. *See* Ex. 2 (AAA rules).
The clause designates a mandatory arbitration location. *Id.* at 20.	**The customer decides the locale of the arbitration** as the customer can choose between the federal district where she lives or the federal district where she purchased the vehicle. Ex. 1.
The dealer's judicial remedies supersede the consumer's arbitral remedies as certain Dealer remedies are not stayed pending the	**A consumer's arbitral remedies are not superseded** as all remedies are stayed pending the outcome of arbitration. Ex. 1

outcome of arbitration. *Id* at 31-32.	

A. Unlike in *Simpson*, Michael and Christine did not lack a meaningful choice in agreeing to arbitrate.

Christine's argument that she lacked a meaningful choice is premised on a distortion of the record. Christine does not dispute that the agreement was conspicuous. Nor can she and her father plausibly claim that the agreement was "hastily" presented to them as they both admit they were eager to leave the dealership as quickly as possible, so any rush to sign the documents was entirely self-imposed. Of the three remaining circumstances that demonstrated Simpson had no meaningful choice, Christine relies almost exclusively on her claim that the agreement was presented on a take-it-or-leave-it basis, and therefore, constituted a contract of adhesion. *See* Pl.'s Second Supp. Memo. at 11. Christine reaches this unfounded conclusion by avoiding and misconstruing the testimony from the depositions

The arbitration agreement was *not* presented on a "take it or leave it basis." All three depositions establish that the arbitration agreement was not required to complete the deal. Christine and Michael admit that no one ever told them they were required to sign the arbitration agreement. They point to no statement or affirmative action whatsoever demonstrating that their signatures were required or establishing that Century BMW was unwilling to waive enforcement. Christine's only support appears to be her ambiguous, unsupported allegation that they "were led to believe that they were required to sign the arbitration agreement," without any articulation of **how** they were led to that belief. The record simply contains no evidence that the agreement was mandatory. Rather, it shows that (1) the F&I manager never said the arbitration agreement was required, (2) neither Michael nor Christine asked any questions about the arbitration agreement, (3) neither Michael nor Christine voiced any objections to the arbitration agreement, (4) Michael

and Christine were eager to leave the dealership as quickly as possible, (5) Century BMW's policy is that the arbitration agreement is not mandatory, and (6) Century BMW has allowed customers not to sign the agreement and still purchase vehicles.

Christine's memorandum also relies on the fact that Century BMW's General Manager could only name one customer who purchased a vehicle without signing an arbitration agreement. Pl.'s Second Supp. Memo. at 5. This is a red herring. Mr. Bishop (Century BMW's General Manager) explained that the dealership handles deals in which a customer does not sign the arbitration agreement no differently than those in which the customer does sign it; the deal is not flagged in any way. Bishop Dep. 23:11-18; 43:20-44:9. Since the General Manager of the dealership is not the dealership employee who interacts with the customer at the time the arbitration agreement is presented to and either accepted or not accepted by the customer, it is hardly surprising that he did not have at his finger tips the names of all of the customers who have declined to sign the arbitration agreement and still purchased vehicles. He testified unequivocally under oath, however, that he knew there were other customers whose names he did not know who have refused to sign the arbitration agreement and still purchased vehicles. *Id.* at 87:10-14.

Even if credited, Christine's testimony that it was her subjective belief that she "had to sign everything" to purchase the car does not advance the ball. All three cases she cites in support of this argument highlight the need for objective evidence, not self-serving subjective beliefs. In *Woods v. QC Fin. Servs., Inc*, Case No. 06-CC-004072-V-CV, at *8 (Mo. Cir. Ct. Dec. 31, 2007), the court emphasized that "courts should not look to the subjective understanding of individual consumers" but should apply an "objective test." Likewise, in both *Simpson*, 373 S.C. at 27, and *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 367

(N.C. 2008), the courts relied on defendants' actual policy—that they would not allow the deal to go forward if the party did not agree to the arbitration agreement—in concluding that the arbitration agreement was presented on a take-it-or-leave-it basis. Here, unlike *Woods, Simpson,* and *Tillman,* the objective facts demonstrate that the agreement was never presented on a take-it-or-leave-it basis because the manager never told the Wattses the agreement was required and the dealership's policy was not to insist on the agreement if a party refused to sign it.

Therefore, the record objectively demonstrates that the arbitration agreement was not mandatory, and Michael and Christine did not lack a meaningful choice in agreeing to it.

B. Christine's arbitration agreement lacks any of the oppressive terms that the *Simpson* Court found unconscionable.

None of the three provisions found to be unconscionable in *Simpson* is in the Wattses' arbitration agreement. Moreover, although plaintiffs' counsel represents that there are 1100 words in the arbitration agreement, Bishop Dep. at 63:16, in all of those words, plaintiffs' counsel has found only one provision that in their multiple briefs they have contended is unconscionable: the class action waiver. The *Simpson* arbitration clause, however, also contained a class action waiver and the South Carolina Supreme Court did not find it unconscionable. Therefore, this Court should do the same.

1. The majority of jurisdictions addressing arbitration agreements with class action waivers—and the only two decisions with binding authority on this Court—have upheld such provisions.

The Wattses mischaracterize the cases addressing class action waivers. Plaintiffs exalt two decisions into an "emerging trend" and ignore the litany of other cases addressing this issue. Pl.'s Second Supp. Memo at 8-11 (discussing *Tillman* and *Woods*).[8] The great weight of

[8] Moreover, these cases are distinguishable. In *Tillman*, for example, the arbitration agreement was mandatory, the customer was rushed to sign the documents, the customer was possibly

authority is that class action waivers are reasonable and enforceable. *See, e.g., Gay v. Creditinform*, 511 F.3d 369 (3rd Cir. Dec. 21, 2007); *Davidson v. Cingular*, 2007 WL 896349, No. 2:06CV00133-WRW (E.D. Ark. 2007); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 878 (11th Cir. 2005), *cert. denied* 126 S. Ct. 1457 (2006).[9] That certain litigation devices—including representative actions—may not be available in an arbitration "is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition' [-] characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims.'" *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 US 20, 31 (1991)); *see also Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1350 (11th Cir. 2005). Indeed, had Christine abided by her agreement to arbitrate, it is almost a certainty that her claim would already have been resolved.

Moreover, the only two decisions with binding authority on this Court that addressed arbitration agreements with class action waivers did not find them unconscionable. As noted above, the arbitration clause in *Simpson* contained a class action waiver but the South Carolina Supreme Court did not find it unconscionable, noting that the arbitration clause "contained a

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responsible for the arbitration costs, and there was no mutuality of remedy—none of which is found here

[9] *See also Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) (precluding class arbitration "does not leave the plaintiffs without remedies"); *Livingston v. Assocs. Fin., Inc* , 339 F.3d 553, 559 (7th Cir. 2003); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 374 (3d Cir. 2000); *Champ v. Siegel Trading Co.*, 55 F.3d 269, 277 (7th Cir. 1995); *Delta Funding Corp. v. Harris*, 189 N.J. 28 (2006); *Edwards v. Blockbuster, Inc.*, 400 F. Supp. 2d 1305, 1309 (E.D. Okla. 2005) ("Such provisions are a common feature of consumer arbitration agreements, and numerous courts have recognized that they are valid and fully enforceable."); *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001) ("[A]rbitration clauses are not unenforceable simply because they might render a class action unavailable.").

total of three unconscionable provisions," none of which included the requirement for individual treatment of claims. *Simpson*, 373 S.C. at 35 n.9. The *Simpson* Court stressed throughout its decision that it would not enforce any provision that "is violative of policy, statutory law, or provisions of the Constitution." *Id.* at 33. Thus, if the provision precluding the consolidation of claims violated the Dealers Act, the court would have found it unconscionable. But it did not do so, confirming that such provisions are enforceable.

Likewise, the United States Supreme Court's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), compels the conclusion that it also views class action waivers as enforceable. There, the Court held that it was for an arbitrator to determine whether the arbitration clause at issue precluded class-wide arbitration. *Id.* at 454. By permitting that arbitrator to decide whether the clause prevented class-wide arbitration, the Supreme Court recognized that class preclusion was permissible; after all, if class preclusion were per se invalid, then the Court would have just said so and not directed the arbitrator to determine whether the agreement allowed for class actions or not. *See also Kinkel v. Cingular*, 857 N.E.2d 250, 262-63 (Ill. 2006) ("The Court's holding in *Green Tree* . . . suggest[s] that an arbitration agreement expressly waiving the ability to arbitrate class claims is enforceable.").

Snowden v. Checkpoint Check Cashing, 290 F 3d 631, 638 (4th Cir. 2002), is particularly instructive. There, the United States Court of Appeals for the Fourth Circuit, upon which the *Simpson* Court relied,[10] rejected a similar attack on a class action waiver in the context of a consumer protection statute. The plaintiff, who sued, *inter alia*, under the Maryland Consumer Protection Act, claimed that the waiver violated public policy because it precluded her from attracting legal representation given her modest claim for damages. *Snowden*, 290 F.3d at 638-

[10] *Simpson*, 373 S.C. at 668-69.

39. The Fourth Circuit disagreed. First, it held that because the prevailing party could recover attorneys' fees, the plaintiff had sufficient ability to obtain legal representation. *Id.* at 638. Second, it "rejected as meritless" plaintiff's argument that the agreement violated public policy, holding that such logic failed to place arbitration agreements on equal footing with other contracts. *Id.* at 639. In upholding the class action waiver, the Fourth Circuit emphasized that the "agreement placed no limitations upon the substantive remedies available to Snowden in arbitration." *Id.* As in *Snowden*, the arbitration agreement here is valid and enforceable because Christine can recover attorneys' fees and the agreement places no limitations on the substantive remedies she can recover in arbitration. Ex. 1.[11]

2. The arbitration agreement does not inhibit a customer's ability to bring a claim against Century BMW.

Christine is able to vindicate her claims under the arbitration agreement inexpensively. Century BMW must pay for nearly all arbitration costs, including any amount of the filing fee in excess of what it would have cost to file in court. Ex. 1. The agreement is also subject to the American Arbitration Association ("AAA") rules, which require the dealership to pay the entire arbitrator's fee in excess of $125. *See* Ex. 2 (AAA rules). Additionally, under the agreement, attorney fees and costs are recoverable in accordance with the applicable law.[12] Ex. 1.

The agreement also grants Christine the right to forego arbitration entirely. If a customer wants to avoid arbitration, the agreement allows her to do so by bringing a claim in small claims

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[11] Invalidating Christine's arbitration agreement would thus create a split between state and federal courts in South Carolina.

[12] *See Jenkins v. First American Cash Advance of Ga., LLC*, 400 F.3d 868 (11th Cir. 2005) (arbitration agreement permitted consumers to vindicate their statutory rights because it expressly permitted the consumers to recover attorneys' fees and costs); *Snowden*, 290 F.3d at 638.

court. Ex. 1. Thus, a customer can easily and inexpensively pursue a claim against Century BMW.

CONCLUSION

For the reasons set forth above, Century BMW respectfully requests that this Court compel arbitration of Christine Watts's claims against it in accordance with the terms of the arbitration agreement and, accordingly, dismiss those claims currently pending in this Court.

Respectfully submitted, this 22nd day of February, 2008.

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ATTORNEYS FOR CENTURY BMW

February 22, 2008
Columbia, South Carolina

ARBITRATION AGREEMENT
(All States Except CA)

DATE: 6.25.05

VIN: 4USBT33554LS50759

In this Arbitration Agreement ("Agreement"), "you" and "your" refers to the customer(s) who sign(s) below. "We", "us", and Dealer refer to the Dealer signing below, and includes the Dealer's employees, agents, and parent and affiliated companies (including, but not limited to, Cornerstone Acceptance Corporation) and their employees and agents. "Parties" refers to you and us. "Vehicle" refers to the automobile identified by the VIN set forth above. "Claim(s)" includes any and all disputes, claims or controversies between the Parties relating to the Vehicle or arising out of or relating to: (a) the application for and the terms of and enforceability of the sale, lease, or financing of the Vehicle, (b) the purchase or terms of any warranty, service agreement, maintenance plan, paint/undercarriage/interior protection product, anti-theft etching product and warranty, GAP protection, deficiency waiver addendum, or any or other product or insurance, (c) any claims of breach of contract, negligence, misrepresentation, conversion, fraud, or unfair and deceptive trade practices, (d) any claim of a violation of any state or federal statute or regulation, or (e) the Vehicle's condition, warranty, workmanship, servicing, maintenance or repair. All Claims must be brought within the time allowed by the applicable statute(s) of limitation. "Contract(s)" refers to any agreement(s) between you and us regarding the sale, lease, financing, service or maintenance of the Vehicle.

Upon the request of a Party, any and all Claim(s) shall be decided in binding arbitration before the American Arbitration Association (1-800-778-7879/www.adr.org) ("AAA"). The Parties may mutually agree to use another arbitration forum and/or qualified arbitrator. Unless mutually agreed otherwise between the Parties, any arbitration under this Agreement shall be conducted under the commercial arbitration rules of the AAA. To the extent that any Claim is deemed a "consumer dispute", the Parties agree that the fee schedule provided in the rules for consumer disputes of the AAA, if any, will apply. You can get a copy of the rules from the AAA. The arbitration hearing shall be conducted, at your option, in the federal district in which you reside or in which the Vehicle was purchased or leased.

The Parties waive the right to request arbitration for a Claim filed and maintained individually (as opposed to a class action) in your state's small claims court, if any. However, if such a Claim originally brought in small claims court is transferred or removed to a higher state or federal trial court, the Parties reserve their right to request arbitration under this Agreement.

The Parties agree that once one of the Parties has elected to arbitrate, binding arbitration is the exclusive method for resolving any and all Claims. By entering into this Agreement the Parties are waiving their right to a jury trial and their right to bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration. Until a Party entitled to do so requests arbitration under this Agreement, any party to this Agreement may proceed with all other rights and remedies they may have. Neither you nor we waive our right to request arbitration under this Agreement, even after all Parties have elected to litigate a Claim in court, in the event new Claims are asserted after the initial filing of such litigation in court.

The arbitrator shall be an attorney or retired judge. The arbitrator shall apply and be bound by governing local, state or federal law when making an award, and shall award only those damages or other relief allowed by such governing law. Issues regarding whether a matter is arbitrable shall be made by the arbitrator. The arbitrator shall prepare a written decision stating reasoned findings of fact and conclusions of law. A party may seek entry of a judgment on the award in any court of competent jurisdiction.

If you initiate a Claim for Arbitration under this Agreement, we agree to pay that portion of the AAA's initial filing fee which exceeds the lesser of the court filing fee for the state or federal court located in the jurisdiction in which you reside. If we initiate a Claim for arbitration we will pay the entire initial filing fee. We also agree to pay up to $1500 of the arbitrator's fees, unless applicable law or the rules of the AAA require otherwise. Unless applicable law or the rules of the AAA require otherwise, the Parties agree to share equally all other costs and fees, including the arbitrator's fees in excess of $1500. Notwithstanding any other provision of this Agreement, we will also pay any amount of fees or costs that a court or the arbitrator decides we must pay in accordance with applicable law for this Agreement to be enforceable. The arbitrator deciding the Claim(s) shall have the authority to award fees, costs, injunctive or equitable relief in accordance with this Agreement and applicable law. Unless otherwise ordered by the arbitrator in accordance with applicable law or provided otherwise by applicable law law, the Parties shall be responsible for the payment of their own attorney's(') fees.

This Agreement evidences a transaction involving interstate commerce. The Parties' Act (9 U.S.C. § 1 *et seq.*) ("FAA") shall

American Arbitration Association
Dispute Resolution Services Worldwide

Consumer-Related Disputes Supplementary PROCEDURES
Effective September 15, 2005

About the AAA
The AAA's Consumer Rules
Availability of Mediation
Administrative Fees
Arbitrator's Fees

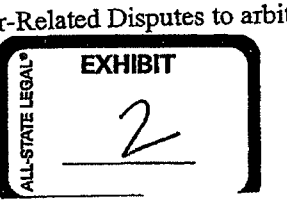
Glossary of Terms
Claimant
Respondent
ADR Process
Arbitration
Desk Arbitration
Telephone Hearing
In Person Hearing
Mediation
Neutral
Case Manager
ADR Agreement
ADR Program
Independent ADR Institution

Resolution of Consumer-Related Disputes Supplementary Procedures
C-1. Agreement of Parties and Applicability
C-2. Initiation Under an Arbitration Agreement
C-3. Initiation Under a Submission
C-4 Appointment of Arbitrator
C-5. Proceedings on Documents ("Desk Arbitration")
C-6. Expedited Hearing Procedures
C-7 The Award
C-8. Administrative Fees and Arbitrator Fees*
Administrative Fees
Arbitrator Fees
Fees and Deposits to be Paid by the Consumer.
Fees and Deposits to be Paid by the Business:

INTRODUCTION

Millions of consumer purchases take place each year. Occasionally, these transactions lead to disagreements between consumers and businesses. These disputes can be resolved by arbitration. Arbitration is usually faster and cheaper than going to court.

The AAA applies the Supplementary Procedures for Consumer-Related Disputes to arbitration clauses



in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The AAA will have the discretion to apply or not to apply the Supplementary Procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator. Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction, even in consumer arbitration cases filed by the business.

About the AAA

The American Arbitration Association (AAA) is a not-for-profit, private organization. We offer a broad range of conflict management services to businesses, organizations and individuals. We also provide education, training and publications focused on ways of settling disputes out of court.

The AAA's Consumer Rules

The AAA has developed the Supplementary Procedures for Consumer-Related Disputes for consumers and businesses that want to have their disagreements resolved by arbitrators. People throughout the world can make use of our services.

Availability of Mediation

Mediation is also available to help parties resolve their disputes. Mediations are handled under AAA's Commercial Mediation Procedures.

Administrative Fees

The Association charges a fee for its services under these rules. The costs to the consumer and business depend on the size and nature of the claims. A fee schedule is included at the end of this Supplement. In certain cases, fees paid by the consumer are fully refundable if the dispute is settled before the arbitrator takes any action.

Arbitrator's Fees

Arbitrators get paid for the time they spend resolving disputes. The arbitrator's fee depends on the type of proceeding that is used and the time it takes. The parties make deposits as outlined in the fee schedule at the end of this Supplement. Unused deposits are refunded at the end of the case.

GLOSSARY OF TERMS

Claimant

A Claimant is the party who files the claim or starts the arbitration. Either the consumer or the business may be the Claimant.

Respondent

A Respondent is the party against whom the claim is filed If a Respondent states a claim in arbitration,

it is called a counterclaim. Either the consumer or the business may be the Respondent.

ADR Process

An ADR (Alternative Dispute Resolution) Process is a method of resolving a dispute out of court. Mediation and Arbitration are the most widely used ADR processes.

Arbitration

In arbitration, the parties submit disputes to an impartial person (the arbitrator) for a decision. Each party can present evidence to the arbitrator. Arbitrators do not have to follow the Rules of Evidence used in court.

Arbitrators decide cases with written decisions or "awards." An award is usually binding on the parties. A court may enforce an arbitration award, but the court's review of arbitration awards is limited.

Desk Arbitration

In a Desk Arbitration, the parties submit their arguments and evidence to the arbitrator in writing. The arbitrator then makes an award based only on the documents. No hearing is held.

Telephone Hearing

In a Telephone Hearing, the parties have the opportunity to tell the arbitrator about their case during a conference call. Often this is done after the parties have sent in documents for the arbitrator to review. A Telephone Hearing can be cheaper and easier than an In Person Hearing.

In Person Hearing

During an In Person Hearing, the parties and the arbitrator meet in a conference room or office and the parties present their evidence in a process that is similar to going to court. However, an In Person Hearing is not as formal as going to court.

Mediation

In Mediation, an impartial person (the mediator) helps the parties try to settle their dispute by reaching an agreement together. A mediator's role is to help the parties come to an agreement. A mediator does not arbitrate or decide the outcome.

Neutral

A Neutral is a word that is used to describe someone who is a mediator, arbitrator, or other independent, impartial person selected to serve as the independent third party in an ADR process.

Case Manager

The Case Manager is the AAA's employee assigned to handle the administrative aspects of the case. He or she does not decide the case. He or she only manages the case's administrative steps, such as exchanging documents, matching schedules, and setting up hearings. The Case Manager is the parties' contact point for almost all aspects of the case outside of any hearings.

ADR Agreement

An ADR Agreement is an agreement between a business and a consumer to submit disputes to mediation, arbitration, or other ADR processes.

ADR Program

An ADR Program is any program or service set up or used by a business to resolve disputes out of court.

Independent ADR Institution

An Independent ADR Institution is an organization that provides independent and impartial administration of ADR programs for consumers and businesses. The American Arbitration Association is an Independent ADR Institution.

SUPPLEMENTARY PROCEDURES FOR THE RESOLUTION OF CONSUMER-RELATED DISPUTES

C-1. Agreement of Parties and Applicability

(a) The Commercial Dispute Resolution Procedures and these Supplementary Procedures for Consumer-Related Disputes shall apply whenever the American Arbitration Association (AAA) or its rules are used in an agreement between a consumer and a business where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The AAA will have the discretion to apply or not to apply the Supplementary Procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator. The AAA's most current rules will be used when the arbitration is started. If there is a difference between the Commercial Dispute Resolution Procedures and the Supplementary Procedures, the Supplementary Procedures will be used. The Commercial Dispute Resolution Procedures may be found on our Web site. They may also be obtained from the Case Manager.

(b) The Expedited Procedures will be used unless there are three arbitrators. In such cases, the Commercial Dispute Resolution Procedures shall apply.

(c) The AAA may substitute another set of rules, such as the Real Estate or the Wireless Industry Arbitration Rules, for the Commercial Dispute Resolution Procedures in some cases.

(d) Parties can still take their claims to a small claims court.

C-2. Initiation Under an Arbitration Agreement

(a) The filing party (the "claimant") must notify the other party (the "respondent"), in writing, that it wishes to arbitrate a dispute. This notification is referred to as the "demand" for arbitration. The demand should·

' briefly explain the dispute,

' list the names and addresses of the consumer and the business,

' specify the amount of money involved,

' state what the claimant wants.

The claimant must also send two copies of the demand to the AAA at the time it sends the demand to the respondent. When sending a demand to the AAA, the claimant must attach a copy of the arbitration agreement from the consumer contract with the business. The claimant must also send the appropriate administrative fees and deposits. A fee schedule can be found in Section C-8 at the end of this Supplement.

(b) The AAA shall confirm receipt of the demand to the parties.

(c) The respondent may answer the demand and may also file a counterclaim. The answer must be sent to the AAA within ten calendar days after the AAA acknowledges receipt of claimant's demand. The answer must:

' be in writing,

' be sent, in duplicate, to the AAA,

' be sent to the claimant at the same time.

' If the respondent has a counterclaim, it must state the nature of the counterclaim, the amount involved, and the remedy sought.

(d) If no answer is filed within the stated time, the AAA will assume that the respondent denies the claim.

(e) The respondent must also send the appropriate administrative fees and deposits A fee schedule can be found in Section C-8 at the end of this Supplement. Payment is due ten calendar days after the AAA acknowledges receipt of claimant's demand.

C-3. Initiation Under a Submission

Where no agreement to arbitrate exists in the contract between the consumer and the business, the parties may agree to arbitrate a dispute. To begin arbitration, the parties must send the AAA a submission agreement The submission agreement must:

' be in writing,

' be signed by both parties,

' briefly explain the dispute,

' list the names and addresses of the consumer and the business,

' specify the amount of money involved,

' state the solution sought.

The parties should send two copies of the submission to the AAA. They must also send the administrative fees and deposits. A fee schedule can be found in Section C-8 at the end of this Supplement.

C-4. Appointment of Arbitrator

Immediately after the filing of the submission or the answer, or after the deadline for filing the answer, the AAA will appoint an arbitrator. The parties will have seven calendar days from the time the AAA notifies them, to submit any factual objections to that arbitrator's service.

C-5. Proceedings on Documents ("Desk Arbitration")

Where no claims or counterclaims exceed $10,000, the dispute shall be resolved by the submission of documents. Any party, however, may ask for a hearing. The arbitrator may also decide that a hearing is necessary.

The arbitrator will establish a fair process for submitting the documents. Documents must be sent to the AAA. These will be forwarded to the arbitrator.

C-6. Expedited Hearing Procedures

A party may request that the arbitrator hold a hearing. This hearing may be by telephone or in person. The hearing may occur even if the other party does not attend. A request for a hearing should be made in writing within ten calendar days after the AAA acknowledges receipt of a claimant's demand for arbitration Requests received after that date will be allowed at the discretion of the arbitrator.

In a case where any party's claim exceeds $10,000, the arbitrator will conduct a hearing unless the parties agree not to have one.

Any hearings will be conducted in accordance with the Expedited Procedures of the Commercial Dispute Resolution Procedures. These procedures may be found on our Web site. They may also be obtained from the Case Manager.

C-7. The Award

(a) Unless the parties agree otherwise, the arbitrator must make his or her award within fourteen calendar days from the date of the closing of the hearing. For Desk Arbitrations, the arbitrator has fourteen calendar days from when the AAA sends the final documents to the arbitrator.

(b) Awards shall be in writing and shall be executed as required by law.

(c) In the award, the arbitrator should apply any identified pertinent contract terms, statutes, and legal precedents. The arbitrator may grant any remedy, relief or outcome that the parties could have received in court. The award shall be final and binding. The award is subject to review in accordance with applicable statutes governing arbitration awards.

C-8. Administrative Fees and Arbitrator Fees*

Administrative fees and arbitrator compensation deposits are due from the claimant at the time a case is filed They are due from the respondent at the time the answer is due. The amounts paid by the consumer and the business are set forth below.

> *Pursuant to Section 1284.3 of the California Code of Civil Procedure, consumers with a gross monthly income of less than 300% of the federal poverty guidelines are entitled to a waiver of arbitration fees and costs, exclusive of arbitrator fees. This law applies to all consumer agreements subject to the California Arbitration Act, and to all consumer arbitrations conducted in California. If you believe that you meet these requirements, you must submit to the AAA a declaration under of oath regarding your monthly income and the number of persons in your household. Please contact the AAA's Western Case Management Center at 1-877-528-0879, if you have any questions regarding the waiver of administrative fees. (Effective January 1, 2003)

Administrative Fees

Administrative fees are based on the size of the claim and counterclaim in a dispute. They are based only on the actual damages and not on any additional damages, such as attorneys' fees or punitive damages. Portions of these fees are refundable pursuant to the Commercial Fee Schedule.

Arbitrator Fees

For cases in which no claim exceeds $75,000, arbitrators are paid based on the type of proceeding that is used. The parties make deposits as set forth below. Any unused deposits are returned at the end of the case.

Desk Arbitration or Telephone Hearing $250 for service on the case
In Person Hearing $750 per day of hearing

For cases in which a claim or counterclaim exceeds $75,000, arbitrators are compensated at the rates set forth on their panel biographies.

Fees and Deposits to be Paid by the Consumer:

If the consumer's claim or counterclaim does not exceed $10,000, then the consumer is responsible for one-half the arbitrator's fees up to a maximum of $125. This deposit is used to pay the arbitrator. It is refunded if not used

If the consumer's claim or counterclaim is greater than $10,000, but does not exceed $75,000, then the consumer is responsible for one-half the arbitrator's fees up to a maximum of $375. This deposit is used to pay the arbitrator. It is refunded if not used.

If the consumer's claim or counterclaim exceeds $75,000, or if the consumer's claim or counterclaim is non-monetary, then the consumer must pay an Administrative Fee in accordance with the Commercial Fee Schedule. A portion of this fee is refundable pursuant to the Commercial Fee Schedule. The consumer must also deposit one-half of the arbitrator's compensation. This deposit is used to pay the arbitrator. This deposit is refunded if not used. The arbitrator's compensation rate is set forth on the panel biography provided to the parties when the arbitrator is appointed.

Fees and Deposits to be Paid by the Business:

Administrative Fees:

If neither party's claim or counterclaim exceeds $10,000, the business must pay $750 and a Case Service Fee of $200 if a hearing is held. A portion of this fee is refundable pursuant to the Commercial Fee Schedule.

If either party's claim or counterclaim exceeds $10,000, but does not exceed $75,000, the business must pay $950 and a Case Service Fee of $300 if a hearing is held. A portion of this fee is refundable pursuant to the Commercial Fee Schedule.

If the business's claim or counterclaim exceeds $75,000 or if the business's claim or counterclaim is non-monetary, the business must pay an Administrative Fee in accordance with the Commercial Fee Schedule. A portion of this fee is refundable pursuant to the Commercial Fee Schedule.

Arbitrator Fees:

The business must pay for all arbitrator compensation deposits beyond those that are the responsibility of the consumer. These deposits are refunded if not used.

If a party fails to pay its fees and share of the administrative fee or the arbitrator compensation deposit, the other party may advance such funds. The arbitrator may assess these costs in the award.

For more information please contact our customer service department at 1-800-778-7879

Rules, forms, procedures and guides are subject to periodic change and updating.

AAA236

- AAA MISSION & PRINCIPLES
- PRIVACY POLICY
- TERMS OF USE
- TECHNICAL RECOMMENDATIONS
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF AIKEN	)	CIVIL ACTION NO.: 06-CP-02-1230
	)	
Heather Herron, Natalie Armstrong, Michael Ritz, Julie Freeman, Christine Watts, Alison Dannert, Michael Blease, Michael Watts, Individually and for the Benefit of All Car Buyers Whom Paid "Administrative Fees" as Described below to Defendants	)	
	)	
Plaintiffs,	)	**PLAINTIFF CHRISTINE WATTS'S REPLY TO SECOND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT CENTURY BMW'S MOTION TO COMPEL ARBITRATION**
vs	)	
Century BMW a/k/a Sonic Automotive; Dick Dyer & Associates, Inc.; Galeana Chrysler Plymouth, Inc. a/k/a Galeana Chrysler Jeep, Inc ; J.L.H. Investments, LP a/k/a Hendricks Honda, Overland, Inc. d/b/a Land Rover of Columbia; Taylor Toyota a/k/a Taylor Investments; and Toyota of Greenville, Inc., et. al.	)	
Defendants.	)	

Plaintiff Christine Watts submits this Reply to Second Supplemental Memorandum in Support of Defendant Century BMW's Motion to Compel Arbitration. Century BMW's Motion to Compel Arbitration should be denied.

1. The Century BMW Arbitration Agreement Should be Viewed with Considerable Skepticism.

The South Carolina Supreme Court in Simpson v. MSA of Myrtle Beach, Inc., 644 S.E 2d 663 (S.C.,2007) stated that a "contract between a consumer and automobile retailer" should be treated with "'considerable skepticism'" because "'automobiles are a common and necessary adjunct of daily life'" and "'adhesion contracts...are standard in the automobile retail industry '" Simpson, 644 SE2d at 669-670. The contract here is also an adhesion contract

between a consumer and an automobile retailer and should be treated with considerable skepticism.

The Wattses recitation of the events surrounding the execution of the Century BMW arbitration agreement are undisputed. Century BMW was unable to present any witness who remembered the transaction. Century BMW's General Manager and the 30(b)(6) deponent on this transaction, admitted that nobody from Century BMW remembered this transaction.[1] Accordingly, the Wattses statements and affidavit cannot be disputed.

The Century BMW arbitration agreement is an adhesion contract. "[A]n adhesion contract is a standard form contract offered on a "take-it-or-leave-it" basis." Simpson v. MSA of Myrtle Beach, Inc., 644 S.E 2d 663, 669 (S.C.,2007). The arbitration agreement was is a form contract drafted by Century BMW.[2]

The arbitration agreement was presented on a take-it-or-leave-it basis. The Wattses testified that they believed they had to sign the arbitration agreement to get the car. Michael Watts testified as follows:

> Q And I take it, from what you've said, you didn't object to signing the document at the time.
> A. I didn't know I didn't have to.[3]

Christine Watts stated:

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[1]Exhibit B, 30(b)(6) Deposition of Century BMW, p. 8, l. 19 to p. 9, l. 12; p. 10, ll. 7-22; p. 13, ll. 12-16; and p. 17, ll. 15-19.

[2]Exhibit B, 30(b)(6) Deposition of Century BMW, p. 37, ll. 7-14 (form contract drafted by Century BMW)

[3]Exhibit A, Deposition of Michael Watts, p. 54, ll. 10-12.

Q Okay. Let's go to Number 14 [arbitration agreement]. Okay? Was CBM-14 passed to you?
A. I'm sure that it was in the packet.
Q. Okay. Is that your signature?
A. That is correct.
Q. Did you know what you were signing?
A. No, I did not.
Q. Why did you sign it?
A. I thought I had to to buy the car.[4]

Ms. Watts also stated:

Q. Why did you think you had to sign any or all of these documents in order to get the car?
A. The way it was presented, I just thought I had to sign everything.[5]

This Wattses testimony is clear and the Wattses are the only ones who remember the transaction

The General Manager stated that the F&I Manager's "practice" was to present the individual documents and point to where the customer was supposed to sign.[6] The F&I Manager would place his finger on the document and say "sign here."[7] This practice leads to only one conclusion, that signing the document is required in order to purchase a car and that the document was presented on a take-it-or-leave-it basis.

This conclusion is further supported by the fact that in over 6,000 transactions, the only person the General Manager could name who was ever allowed to buy a car without signing the

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[4]Exhibit C, Deposition of Christine Watts, p. 50, ll. 10-18.

[5]Exhibit C, Deposition of Christine Watts, p. 51, ll. 2-6.

[6]Exhibit B, 30(b)(6) Deposition of Century BMW, p 22, l. 14 - p. 23, l. 1.

[7]Exhibit B, 30(b)(6) Deposition of Century BMW, p. 22, l. 1 - p. 23, l. 1.

arbitration agreement was Brad Martin, Esq., a lawyer in this case.[8] Century BMW sells 1,200 cars annually, has used the arbitration agreement since at least 2002, and the General Manager can only recall the lawyer in this case, whom was allowed to buy a car without signing the arbitration agreement.[9]

Additionally, use of the car is a necessity to Ms. Watts. The car was purchased to be Ms. Watts's primary source of transportation and was purchased so that she could get back and forth from work.[10] Century BMW in their memorandum argues that the vehicle was not necessity because Christine Watts previously owned a Mitsubishi Montero.[11] The fact that Ms. Watts previously owned another vehicle does not defeat the fact that use of a car is a necessity. The plaintiff in Simpson, prior to purchasing the car in that case, owned a 2001 Toyota 4-Runner and the South Carolina Supreme Court expressly found that the car purchased was a necessity. Simpson, 644 S.E 2d at 663. This Court should follow the Simpson court and find that the car purchased by Ms. Watts was a necessity because, like the car purchased in Simpson, Ms. Watts was purchasing the new car to be her primary source of transportation. Thus, the Century BWM arbitration agreement, like the arbitration agreement in Simpson, should be viewed with considerable skepticism.

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[8]Exhibit B, 30(b)(6) Deposition of Century BMW, p. 30, l. 19 to p. 31, l. 14 and p. 49, ll. 20-23.

[9]Id.

[10]Exhibit C, Deposition of Christine Watts, p. 59, ll. 11-20.

[11]Exhibit A, Deposition of Michael Watts, p. 56, ll. 13-19.

2. **The Wattses had an Absence of Meaningful Choice in Entering into the Century BMW Arbitration Agreement**

The South Carolina Supreme Court in Simpson set forth the following the test for determining whether there was an absence of meaningful choice when entering into an arbitration agreement:

> Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. In determining whether a contract was "tainted by an absence of meaningful choice," courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.

Simpson v. MSA of Myrtle Beach, Inc., 644 S E.2d 663, 669 (S C.,2007). All of these factors are present in this case.

There is a clear disparity in the parties bargaining power and the relative sophistication between the parties. Century BMW argues that Ms. Watts is an auditor and therefore is a sophisticated party. This argument is misleading. While it is true that now, in 2008, Ms. Watts works as an auditor, what Century BMW fails to clarify for the Court is that in 2005, when the vehicle was purchased, Ms. Watts was a student at the College of Charleston.[12] Michael Watts sells garage doors.[13] The Plaintiffs were not sophisticated businesses concerns. *See* Simpson, 644 S.E 2d at ("In determining whether a contract was 'tainted by an absence of meaning choice' courts should take into account...whether the plaintiff is a substantial business concern...").

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[12]Exhibit C, Deposition of Christine Watts, p. 9, ll. 16-20; Exhibit B, Deposition of Michael Watts, p. 9, l. 23 to p. 10, l. 3

[13]Exhibit A, Deposition of Michael Watts, p 17, l. 15 to p. 18, l. 4.

Century BMW, on the other hand, is owned by Sonic Automotive, Inc., a multi-million dollar corporation that owns dozens of car dealerships.[14] Sonic Automotive, Inc. drafted the agreement and the Wattses did not have an attorney present when they signed the agreement.[15] Clearly, there was a disparity of bargaining power between the parties.

The Century BWM arbitration agreement was inconspicuously placed within a packet of documents that included documents which were required to be signed by law.[16] Plaintiff's uncontradicted testimony that the arbitration agreement was presented to them in a big packet containing flags indicating where the Wattses were supposed to sign supports the Wattses' understanding that they were required to sign the arbitration agreement.[17] Christine Watts testified as follows:

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[14]*See* http://www.sonicautomotive.com.

[15]Exhibit B, 30(b)(6) Deposition of Century BMW, p. 37, ll. 7-14 (form contract drafted by Century BMW) and Exhibit C, Christine Watts, p. 51, ll. 7-9 and Exhibit D, Affidavit of Christine Watts, ¶ 8.

[16]Exhibit A, Michael Watts, p. 53, ll. 10-20 (packet of documents); Exhibit C, Deposition of Christine Watts, p. 51, l. 2- p. 52, l. 17 (packet of documents); Exhibit B, 30(b)(6) Deposition of Century BMW, p. 59, ll.1-16; p. 60, ll. 10-19; p. 66, ll. 13-18; p. 67, l. 21 to p. 68, l. 2 (documents required to be signed by law); *See also* Exhibit A, Deposition of Michael Watts, p. 51, ll. 7-13 (same)

[17]Id

Q. Okay. Let's go to Number 14 [arbitration agreement] Okay? Was CBM-14 passed to you?
A. I'm sure that it was in the packet.
Q. Okay. Is that your signature?
A. That is correct.
Q. Did you know what you were signing?
A No, I did not.
Q. Why did you sign it?
A. I thought I had to to buy the car.[18]

Michael Watts testified as follows·

Q· So you were here just get out of there.
A: Yes, sir. All the papers were together, and he handed me all the papers.[19]

Additionally, the packet included at least three documents that were required to be signed by law [20] Century BMW inconspicuously placed the arbitration agreement within a packet that included documents that were required to be signed by law and then had its F&I Manager point at each document (whether required to be signed by law or not) and say sign here. This is not a fair bargaining process because it makes it appear that signing all of the documents is mandatory. *See* Simpson, 644 S.E.2d at 660 ("Absence of meaningful choice...speaks to the fundamental unfairness of the bargaining process in the contract at issue.").

Additionally, there was an element of surprise with the Century BMW agreement because the agreement is not easily understandable. Defendant Century BMW argues that the Wattses should have read and understood the arbitration agreement This argument fails as even Century

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[18]Exhibit C, Deposition of Christine Watts, p. 50, ll. 10-18

[19]Exhibit A, Deposition of Michael Watts, p. 53, ll. 18-20.

[20]Exhibit B, 30(b)(6) Deposition of Century BMW, p. 59, ll.1-16; p. 60, ll. 10-19; p. 66, ll. 13-18; p. 67, l. 21 to p. 68, l. 2 (documents required to be signed by law), *See also* Exhibit A, Deposition of Michael Watts, p. 51, ll 7-13 (same).

BMW's Rule 30(b)(6) representative as the person most knowledgeable on the arbitration agreement testified that he did not have much understanding of how the arbitration agreement worked.

> Q. Okay. Does Mr. Courtney James know anymore about how arbitration works than you, or would you say you're better?
> MR. BLACK: It's Corey James.
> MR. LEWIS: Corey James. Mr. James.
> A. I would say neither one of us would be involved in the process or actually been through the process.
> Q. Or know anything about it?
> A. Not much.
> Q. Or what the rules are or what you have to do; do you know any of that?
> A. No, sir.[21]

Century BMW's General Manager has thirty-two years worth of experience in the car industry[22], has dealt with the subject arbitration agreement since 2002, and does not understand the arbitration agreement. Similarly, the F&I manager, whom presented the arbitration agreement to the Wattses, does not understand the agreement.[23] If Century BMW's own people do not understand the agreement, how were the Wattses, whom were in a little cubicle with the F&I Manager[24] with his finger pointing on the document[25], supposed to understand the agreement? Clearly, there is a "fundamental unfairness" in this bargaining process. *See* Simpson, 644 S.E.2d at 660 ("Absence of meaningful choice...speaks to the fundamental unfairness of the bargaining

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[21]Exhibit A, 30(b)(6) Deposition of Century BMW, p. 24, l. 18 - p. 25, l. 6.

[22]Exhibit B, 30(b)(6) Deposition of Century BMW, p.45, ll. 10-12.

[23]Exhibit A, 30(b)(6) Deposition of Century BMW, p. 24, l. 18 - p. 25, l. 6.

[24]Exhibit C, Deposition of Christine Watts, p. 39, ll. 3-14.

[25]Exhibit A, 30(b)(6) Deposition of Century BMW, p. 22, l. 1 - p. 23, l. 1.

process in the contract at issue.").

Even if the arbitration agreement was easily understood, a point which is denied, the explanation the General Manager would expect to be given to the customers is misleading and unfair. The General Manager testified as follows:

Q: Can you sit here and tell me what this form contains?
A. I'm not an expert, but I can tell you that this is a document providing remedy for the customer without having to go to court.
Q. If you were to explain it, that's what you would say?
A. Yes, sir.
Q. Is there anything else you'd tell them other than it's a remedy for the customer and you don't have to go to court?
...
A. No, sir, I would tell them nothing else.
Q. Okay. And is that what you expect your employees to tell the -- the people?
A. They're more informed than I.
Q Well, is that what you expect them to tell them, at least that?
A. At least that.
Q. Okay. Is there anything else you expect to tell -- them to tell them?
A. No, sir.[26]

The expected Century BMW explanation makes it sound like arbitration is a great deal for the customer. It appears from this explanation that the customer is not giving up anything but instead gaining an extra remedy, the ability to get relief without going to court. This is misleading because the arbitration agreement takes away rights otherwise available by law, including statutory rights under the Dealers Act

The arbitration agreement is simply a device designed to protect Century BMW by making it economically impracticable for a customer to pursue a claim against Century BMW The arbitration agreement and its limitation on group relief is contrary to the Dealer's Acts "very purpose of punishing acts that adversely affect the public interest" (Simpson, 644 S.E.2d at 671)

[26]Exhibit A, 30(b)(6) Deposition of Century BMW, p. 16, l. 9 - p. 17, l. 10.

and therefore should not be enforced. *See* Simpson, 644 S.E.2d at 671citing S.C. Code Ann. § 56-15-130 (2006)("The Dealers Act..specifically provides that "any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable.").

CONCLUSION

For the reasons stated at oral argument, in Plaintiffs' prior memorandums, and the reasons stated above, Defendant Century BMW's Motion to Compel Arbitration should be denied.

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Attorneys for the Plaintiffs

February 22, 2008

Columbia, South Carolina

STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF AIKEN
HERRON, et al.,

Case No.
Plaintiffs, 2006-CP-02-1230

vs.

DICK DYER & ASSOCIATES, INC., et al,
Defendants.

DEPOSITION OF: MICHAEL WATTS

DATE: January 29, 2008

TIME: 9:08 a.m.

LOCATION: LEATHERWOOD WALKER TODD & MANN, P.C.
300 East McBee Avenue, Suite 500
Greenville, South Carolina

TAKEN BY: Counsel for Defendant,
CENTURY BMW

REPORTED BY: KATHY P. TAYLOR,
Registered Professional Reporter

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EXHIBIT
A

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ALSO PRESENT
MELANIE BLEASE, Paralegal

(Index at rear of transcript)

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STIPULATION

It is stipulated by and between Counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, Rule 30; that all objections as to Notice of this deposition are hereby waived, that all objections except as to form are reserved until the time of trial; and that the deponent does not waive reading and signing of this deposition.

* * * * * * * * * * *

MICHAEL WATTS,

being first duly sworn, testified as follows

EXAMINATION

BY MR BLACK

Q Good morning, Mr Watts Could you state your name and address for the record

A Michael M. Watts 210 Providence Square, Greenville, South Carolina 29615

Q And, Mr Watts, my name is Dennis Black I'm from a law firm called Williams & Connolly. And do you understand I represent Century BMW in this case?

A Correct.

Q. Okay The other counsel at the table, just so you know, also represent others, either Century

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BMW or other defendants in the case And you have your counsel here?

A Yes

Q Okay Have you ever had your deposition taken before?

A One time

Q And when was that?

A About 20 years ago

Q And was that in a business dispute, a personal dispute?

A It was a workers' comp dispute

Q Just to give you a little refresher course after 20 years, I'll be asking a series of questions today Hopefully you'll be answering them. If you can try to answer the questions aloud and with words, because the court reporter can't take down nods and shakes and shrugs

A Okay

Q Is that acceptable?

A It's – yes

Q And try to avoid saying uh-huh or huh-uh in response to my questions because they look very similar on the transcript, and it will be hard to decipher later Is that –

A Yes, sir

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Q If you don't understand any of my questions, please ask me to clarify or explain any problem you have with the question And if you have a problem or need clarification, please direct your request for clarification to me and not to your counsel.
A Yes, sir
Q Is that okay?
A (Witness nods head)
Q And under the rules, just so you know, you're not allowed to talk to your counsel about this deposition or the case from now until when we conclude the deposition, even if we take a break. Is that acceptable?
A Yes, sir
Q And if -- this isn't an endurance contest, so if at any time you need to take a break for any reason, feel free to ask, and we'll take a break.
A Yes sir
Q Okay What did you do to prepare for your deposition today?
A I met with counsel on Sunday night I got the time and place where we were going to meet, and we briefly looked at the paperwork.
Q And what -- when you say the paperwork,

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what paperwork was that?
A The sale paperwork. The information for the bill of sale when we bought the car
Q How many documents would you say you looked at?
A 20 Approximately 20.
Q And without getting into the substance of what was said, did you have a chance to discuss those documents with your counsel?
A Briefly
Q Had you seen all the documents you were shown before?
A No sir
Q Did it include -- I sent over last week to your counsel a -- the dealership's file on the transaction. Were those the documents you reviewed?
A Yes, sir
Q Okay And did you review any of them outside the presence of your counsel?
A No sir
Q Okay So to the extent you had discussions about the documents it was only with your counsel?
A Yes, sir
Q How long was your meeting on Sunday night with your counsel?

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A Approximately 30, 35 minutes
Q And where did it take place?
A Took place at my wife s office Land America
Q And there's Christine Watts that's also a plaintiff in this case Is that your daughter?
A Yes, sir
Q And have you talked with her about the case or your transaction in preparation for the deposition?
A Yes, sir
Q Uh-huh And when was that?
A Sunday night when we met.
Q Okay Was -- was she present for your meeting with counsel?
A Yes, sir
Q Was anyone else present?
A Melanie Blease
Q And is that the young lady sitting over here?
A Yes sir
Q Is she also a plaintiff in the case --
A No, sir.
Q -- do you know? No? The -- anyone else?
A No, sir.

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Q Did you have any discussions with your daughter, Christine Watts, outside the presence of your counsel about the transaction or this case?
A Yes, sir
Q Oh, okay And when was that?
A Sunday night, on the way home.
Q All right. And what did you discuss with her on the way home?
A We discussed primarily the taking of a deposition, what it involved and, you know, you would be asking me questions And I was trying to rehash the deposition process
Q Uh-huh
A And --
Q And has Christine had her deposition taken before?
A No, sir
Q Did you dis- -- rehash any of the details of the negotiation of the car deal or the transaction at Century BMW in this conversation outside the presence of your counsel?
A Yes, sir
Q And tell me about that. What was said on that subject?
A We discussed -- I could not remember what

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we bought the car for, the purchase of the car, because it was primarily for her as a graduation present And all the steps

Q And by all the steps, you mean all the steps --

A All the steps in the process, trying to review the purchase of the car

Q And did the two of you refresh each other's recollections as to what went on?

A She told me how much money we paid for the car We were talk- -- I couldn't even remember the purchase price

Q Uh-huh. Did she refresh your recollection about any other details of the transaction?

A No It was pretty much the conversation was towards the purchase price and how we financed the car

Q Was there anything that she didn't remember that you were able to refresh her recollection about?

A I'm thinking of the conversation, because it was brief She just mentioned that on the last page, the -- the commission statement on the car, you know how much profit was made on the car

Q And I take it that was something you didn't

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know until --

A I had no idea. That's not my business

Q And the dealership didn't provide you with that information at the time of the transaction?

A No, sir

Q Okay And what did she have to say on that subject?

A That was -- they did pretty good

Q Did you have any other discussions about the transaction or the case in this ride home with your daughter on Sunday night?

A The only other thing that I can remember was that I told her I couldn't remember some of the paperwork that we had looked at.

Q And that was some of the paperwork you had had the opportunity to discuss with counsel earlier in the evening?

A Yes, sir

Q Okay And since that drive home Sunday night, have you talked to her any further about the case or the transaction?

A The only thing that we talked about was last night, that we both were nervous about the deposition

Q No need to be nervous

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A Yeah.

Q Okay. And prior to Sunday night, within the last couple of months, have you had any discussions with your daughter about the case or the deposition?

A We have not really talked about it.

Q Does she live at the same address as you?

A No sir

Q I'd like to talk a little about your educational background Could you describe any education you've had since high school?

A I graduated the University of South Carolina with a major in journalism

Q And what year did you graduate?

A '78.

Q And that's the University of South Carolina in Columbia?

A Columbia.

Q And was that a bachelor's degree?

A Yes, sir

Q And since getting your bachelor's degree in 1978 have you done any further education?

A No, sir

Q Could you -- starting with when you graduated from University of South Carolina, could

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you just -- what was your first job after college?

A First job was working for Wallace Business Forms as a salesman. Oh, I worked for J M. Fields as an appliance manager prior to Wallace Business Forms, while I was looking for a full-time job

Q Okay And J M. Fields is what type of business?

A It was a retail store, similar to like a Sears. They're out of business now

Q Okay And your job was with respect to appliances?

A I was selling appliances

Q Okay And was that selling appliances to consumers rather than businesses?

A Consumers

Q Did you also sell like extended warranties and the like?

A No, sir

Q And then you went to work for Wallace Business Forms?

A Correct

Q And what was your position there?

A Sales rep

Q And what was the business of Wallace Business Forms?

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A. They designed and sold computer forms to companies
Q. And by computer forms, that would be what type of forms?
A. Continuous custom-made business forms, such as invoices.
Q. And how long did you remain in the position as a sales rep for them?
A. Approximately two years
Q. So up to about 1980?
A. Yes, sir
Q. And what was your next job position?
A. I worked for Spartan Express. They're a transportation company. As a sales rep
Q. And what would you have been selling?
A. Transportation services.
Q. Is that like trucking or --
A. Trucking.
Q. And how long did you remain in that position?
A. Approximately two, two and a half years.
Q. So we're up to about 1983ish?
A. Give or take, yes, sir
Q. And what was your next job position?
A. I went to work for AAA Cooper

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Transportation, trucking company, sales rep.
Q. And were you again selling trucking services?
A. Yes, sir
Q. And how long were you in that position?
A. I was in that position for four to five years
Q. So we're up to 1988ish?
A. Yeah.
Q. And then what did you do?
A. I moved to Columbia with AAA Cooper. I was still working for AAA Cooper
Q. Oh, okay. And when you moved to Columbia, did you take on a different position?
A. I was primarily in sales for the first year. It was a new territory
Q. And you said for the first year. Did you -- did you change positions after a year?
A. They opened a terminal, and I became terminal manager
Q. And that was about 1989?
A. Yes, sir. Approximately, you know
Q. What were your job responsibilities as terminal manager?
A. To hire employees.

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Q. Did you also manage them --
A. I mean --
Q. -- once you hired them?
A. I managed the employees. I was responsible for the entire operation.
Q. And how many employees were you responsible for at the terminal?
A. 45
Q. And how long did you remain in the position as terminal manager?
A. Until nineteen-ninety- -- 1999 Approximately
Q. And what did you -- what position did you take on in 1999?
A. Sales manager for environmental accessories
Q. And what type of environmental accessories are you referring to?
A. Environmental accessories, we sold -- we were a broker, and we sold services to industry for handling their non-haz and hazardous materials.
Q. And how long were you in that position?
A. To 2004. Approximately
Q. Okay. And what was your next position?
A. I went to work for W W Grainger

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Q. And what business are they in?
A. Industrial sales
Q. And what was your position with W W Grainger?
A. Government sales
Q. And what would you have been selling?
A. Nuts, bolts, industrial maintenance supplies.
Q. And I thought I had heard you say before that you still work for AAA Cooper today
A. No, sir
Q. Okay. I misheard. How long were you with -- or are you still with W W Grainger?
A. No, sir
Q. Okay. What was your next position?
A. Next position. I left W W Grainger and I presently work for Bill Rite Corporation
Q. Bill Rite?
A. Bill Rite. Yeah.
Q. And how do you spell Bill Rite?
A. B-I-L-T R-I-T-E
Q. Two words?
A. Two words
Q. And what was your first position with Bill Rite?

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A. I'm a sales rep, and manager in Greenville
Q. And what is the business of Bilt Rite?
A. I call on contractors and sell garage doors.
Q. And is that garage doors for residential?
A. Residential.
Q. And that's your position today?
A. Correct.
Q. Aside from working for Bilt Rite do you do any other work?
A. I teach fly fishing
Q. And where do you teach that?
A. Clemson University
Q. And how long have you done that?
A. Two weeks
Q. Aside from your recent two-week stint teaching fly fishing, have you ever taught any courses before?
A. Not besides fly fishing.
Q. Okay But you've taught fly fishing before?
A. I've taught fly fishing classes.
Q. And what department is fly fishing in at Clemson?
A. Leisure Skills

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Q. And I think you said you're married?
A. Yes, sir
Q. And your wife's name is Phyllis?
A. Correct.
Q. And is she employed?
A. She is employed with Land America
Q. And what does she do?
A. She's a branch manager.
Q. And what business is Land America in?
A. Title insurance
Q. How did you first come to meet the lawyers who are representing you in this case?
A. Melanie Blease was my daughter's roommate at the College of Charleston
Q. And Ms Blease is, I understand, a paralegal for the Plaintiff's law firm?
A. Yes, sir
Q. So did your introduction to the lawyers come through your daughter?
A. Yes sir
Q. And as you understand it, your daughter's introduction to the lawyers came through Ms. Blease?
A. Correct.
Q. When was the first time you purchased an automobile?

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A. In high school
Q. And how many automobiles have you purchased in your life?
A. Approximately 10, 12.
Q. And have those all been from automobile dealerships?
A. Yes
Q. And in this 10 to 12 car purchases you've made in your life did you negotiate the price in each of them?
A. Yes, sir
Q. And did you always realize when you were buying the car that you know the price is negotiable at a car dealership?
A. I try to make it negotiable
Q. Have you ever been -- have you ever had an automobile transaction which the dealership refused to negotiate on the price?
A. They refused up to a point.
Q. In other words, the negotiations reached a point where they said, we won't take a penny less
A. Correct
Q. But up to that point, they negotiated
A. Correct.
Q. And then you had the choice as to whether

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you were going to buy the car or not.
A. Yes, sir
Q. In connection with -- putting aside your transaction at Century BMW, is the transaction that brings us here today the only time you've ever had a deal with Century BMW?
A. Yes, sir
Q. Okay Prior to Century BMW, had you ever signed an arbitration agreement in connection with a car purchase?
A. I do not remember
Q. Did you, also, in the relatively recent past, buy a car at Toyota of Greenville?
A. Yes, sir
Q. And do you know if there was an arbitration agreement included with that transaction?
A. No sir
Q. You don't know or --
A. I don't remember I --
Q. Okay Prior to your transaction at Century BMW, had you ever signed an arbitration agreement in any context?
A. I don't believe I have
Q. Have any of your employers ever asked you to sign an arbitration agreement?

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A. I don't remember. I don't think so.
Q. Okay. When you were the terminal manager for -- was it AAA Cooper?
A. Yes, sir.
Q. -- did they have arbitration agreements with their employees; do you know?
A. No, sir.
Q. In any of your various sales representative jobs -- where I assume you entered into contracts with people to sell them products; is that --
A. Not -- there were very few contracts. It was more on a purchase order basis.
Q. Were there ever arbitration agreements involved in those deals, to your knowledge?
A. No, sir.
Q. Have you ever been asked to sign an arbitration agreement and refused to do so?
A. No, sir.
Q. Do you have an understanding of what arbitration is?
A. No, sir.
Q. Do you understand it's another way of resolving a dispute other than going to court?
A. I've kind of got -- I've got that idea, yes, sir.

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Q. But beyond that very basic idea, you don't know the details of it?
A. I've never been involved, no, sir.
Q. So I take it you have no either good or bad impressions of the process.
A. No, sir.
Q. I think you just answered this, but have you ever participated in an arbitration, either as a witness or a party?
A. No, sir.
Q. I think you testified the vehicle you purchased at Century BMW was a graduation present for your daughter?
A. Yes, sir.
Q. To the extent there was a search for a vehicle to purchase for your daughter, who conducted it primarily; was it you or her?
A. She did.
Q. And what, briefly, do you understand she did in that process?
A. Looked on the internet, told her friends, asked her friends, and just looked at body styles in the internet.
Q. Were you specifically looking for a used vehicle?

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A. No, sir.
Q. Were you specifically looking in a certain price range?
A. She wanted a convertible.
Q. And did you pretty much leave the search for the convertible to her?
A. Yes, sir.
Q. Okay. And did you understand in the market for used vehicles, there are a number of different places you can buy a used vehicle from?
A. Yes, sir.
Q. You understand that you don't even have to go to a car dealership, you can buy it from a private individual?
A. Correct.
Q. And there are ads in the newspaper you can look to for vehicles?
A. Yes, sir.
Q. There are internet sites, like Craig's List and others, that -- where people post cars they're selling?
A. Yes, sir.
Q. Specialized publications like -- in D.C., it's called Auto Trader, but where they have nothing but car ads in them?

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A. Yes, sir.
Q. You can also go to new car dealerships.
A. Yes, sir.
Q. And I take it there are a number of new car dealerships in the Greenville area?
A. Yes, sir.
Q. So you weren't limited to going to Century BMW by any --
A. No, sir.
Q. Also, are you familiar with used car dealerships like CarMax?
A. Yes, sir.
Q. And do you know where -- did you go to any other dealerships in the search for a graduation present?
A. Reluctantly.
Q. Okay. How many dealerships did you visit?
A. Two.
Q. And is that two in addition to Century BMW or two --
A. Yes.
Q. Okay. What were the other two?
A. Fairway Ford and CarMax.
Q. And did you do anything other than look at cars at either of those dealerships?

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A. We made an offer
Q. At both?
A. No, sir. At Fairway Ford.
Q. And is Fairway Ford here in the Greenville area?
A. Yes, sir.
Q. And do you remember what type of vehicle you made an offer on?
A. Ford Mustang.
Q. I take it that it was a convertible?
A. It was a convertible.
Q. And did you engage in price negotiation back and forth?
A. Yes, sir.
Q. And I take it you didn't buy the car.
A. No, sir.
Q. And why was that?
A. We had -- I'm going -- we had -- I had talked to a gentleman at a Greenwood Ford dealership first on a car, told him what my daughter was looking for. And I do not remember how I engaged in conversation with him. And he found one, and he was negot- -- we were negotiating price. And my daughter had gone by Fairway Ford and driven the car. And they came up with a less -- a cheaper

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price the dealership in Greenwood than we could have bought it at Fairway Ford. And then when they found out my daughter had driven the car, they wouldn't sell it to me, so I walked.
Q. They said --
A. It --
Q. Okay. You engaged in price negotiations with the Greenwood dealership?
A. Yes, sir.
Q. And when they found out you had test driven a car at a different dealership, they wouldn't sell you a vehicle at their dealership, is that --
A. Pretty much, in a nutshell.
Q. Did they give you a reason for that?
A. Pretty -- they were trying to protect the other dealership, Fairway Ford.
Q. Did they co-own or --
A. I don't know. I -- you know, I walked.
Q. Okay.
A. I didn't get into any of the specifics. I just -- I left.
Q. And did you -- had you engaged in any price negotiations at Fairway Ford?
A. I hadn't. I --
Q. So how did you know the deal was cheaper at the Greenwood dealership?

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A. I went on the internet and was just looking at cars. And naturally, I got tagged from the dealership in Greenwood when -- in my search.
Q. Okay. So you gave like contact information, and they called you?
A. Yes, sir.
Q. How long did you spend doing research on the internet?
A. Very little.
Q. Had you ever been to Century BMW before you bought the car?
A. We had test driven a car there.
Q. And was that in connection with the same search, or was it a prior vehicle?
A. No, sir, it was a prior vehicle.
Q. Okay. And when was that?
A. Six months or a year prior to buying the vehicle.
Q. So was that in connection with the search for the car you ended up buying at Toyota of Greenville?
A. No, sir.
Q. For whom were you looking for a car when you test drove the car at Century BMW six months

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ago?
A. Nobody. My daughter wanted to test drive the four-door convertible, so we did.
Q. Did you engage in any price negotiations the six months earlier?
A. No, sir.
Q. And was that a new or used vehicle she --
A. It was --
Q. -- wanted to test drive?
A. It was new.
Q. When you came to Century BMW in connection with the purchase of the 2004 Z4, had your daughter already been there?
A. No, sir.
Q. Did you come together?
A. Yes, sir.
Q. Okay. And when you came, did you already have a car in mind?
A. No, sir.
Q. Once you got to the dealership, did you walk around the lot and look at a lot of different cars?
A. Yes, sir.
Q. Okay. Tell me about that. How many cars did you look at?

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A. I don't remember We didn't test drive --
I don't remember if we test drove any besides the
Z4
Q. And did you walk around the lot on your
own, or were you accompanied by someone else other
than your daughter?
A. We were accompanied by a salesperson
Q. Okay Was that a male or a female?
A. Female.
Q. Do you remember her name?
A. No, sir
Q. And did she describe the various cars to
you?
A. Yes, sir
Q. Did you like her?
A. She was nice
Q. Okay So I take it she didn't put undue
pressure on you as you were touring the lot?
A. No, sir
Q. Okay How did you come to -- I think you
said you test drove the Z4
A. Correct.
Q. Did you test drive it, or your daughter, or
both?
A. We both test drove it.

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Q. And did the salesperson accompany you?
A. I think she -- if I -- I think she
accompanied my daughter, and I think my daughter and
I drove it.
Q. After test driving the vehicle, did you
determine you wanted to buy it?
A. I let my daughter make the decision
Q. Okay Did she express an interest in
purchasing the car?
A. Yes, sir
Q. Okay Did she like the car?
A. Yes, sir.
Q. And at that point, did you engage in any
price negotiations with anyone at the dealership?
A. Not right then. We went back and talked
about it.
Q. Okay So you test drove the car and
decided you liked it, and left
A. Correct.
Q. Okay And why did you leave rather than
stick around and negotiate the purchase right then?
A. We wanted to think about it, talk about it,
and I wanted to call the credit union and check on
financing
Q. And how long after you test drove the car

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was it before you returned to negotiate the deal?
A. Probably -- I think -- I can't remember
it was within a day
Q. Were you aware that the dealership would
likely offer you financing on the vehicle?
A. Yes, sir
Q. But you preferred to finance it elsewhere?
A. Yes, sir
Q. So I take it you understood you didn't have
to enter into a financing agreement with the car
dealership in order to purchase the car
A. Yes, sir
Q. Is it your general practice to finance car
purchases through your own credit union --
A. Yes sir
Q. -- rather than the dealership?
A. Yes, sir
Q. Have you ever financed the terms of a --
have you ever financed a car through the car
dealership?
A. Yes, sir
Q. And did you engage in negotiations on the
terms of the financing?
A. No, sir
Q. You realized you were free to ask for a

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lower interest rate than what they offered you, I
take it
A. I figured they would offer me the lowest.
I didn't know that their finance rate would be
negotiable.
Q. But in any event, you determined you were
going to get financing away from Century BMW for
this transaction.
A. Right
Q. When you came back to the dealership to
negotiate the purchase, who did you meet with?
A. The salesiady
Q. And was it the same saleslady you dealt
with previously?
A. Yes, sir
Q. And when you came back, did you come back
alone or with your daughter?
A. We negotiated via telephone
Q. Okay So you didn't come into the
dealership?
A. I did not come -- I called, and we
negotiated over the telephone.
Q. Okay
A. And then once the price was agreed upon, we
went from there

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Q. And is the reason you dealt with them by phone, was it because you felt more comfortable being at home rather than being at the dealership with the employees?
A. You know, I don't know why we did it from the house.
Q. Who was on the phone when you were negotiating the price?
A. The saleslady and I
Q. Okay. Was Christine on an extension, or was it just you and the salesperson?
A. It was just me and the salesperson.
Q. Okay. Who called –
A. Christine was in the room
Q. Okay. So she may have overheard – I take it the salesperson wasn't on a speakerphone in your house
A. No, sir
Q. Okay. So Christine may have overheard your side of the conversation, but she wouldn't have heard the other side?
A. Correct
Q. Okay. Who initiated the phone call?
A. I did.
Q. Okay. And did you ask to speak to the

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saleslady?
A. Yes, sir
Q. And did – when you called, did you tell her you were interested in getting the Z4?
A. Yes, sir
Q. And did you make an offer on the vehicle?
A. Yes, sir
Q. Had there been a – any sort of price on the car?
A. Yes, sir. I don't remember what it was
Q. Okay. Do you remember how it was posted on the car? Was it written in shoe polish, or was it on some sort of sticker?
A. I don't remember
Q. Okay. And had you discussed that price at all with the salesperson when you were back at the dealership?
A. No, sir
Q. So you called – I think her name is Elizabeth Courtney; does that ring a bell?
A. Sounds familiar
Q. Well, whoever it was, you called –
A. Yes
Q. – the salesperson, and you made an initial offer

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A. Correct.
Q. And what did she say? Do you remember what your initial offer was?
A. No, sir
Q. Was it, I take it, less than you ended up paying?
A. More than likely
Q. But you don't recall?
A. I do not remember
Q. Okay. And did you have – when you made the call, did you have a bottom-line figure in mind that you wouldn't pay more than?
A. Yes, sir
Q. Do you remember what that was?
A. I'm feeling my brain. 30 – it was 31, 32, somewhere right in there
Q. Okay
A. I do not remember exactly
Q. And you know – you knew that if the dealership, for whatever reason, didn't offer terms that you were comfortable with, you could hang up the phone, and you weren't under any obligation to purchase the vehicle from them, is that fair?
A. That's fair
Q. Okay. And that would include terms other

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than the price, such as if they refused to offer you a warranty on the car, you could hang up the phone and not have to deal with them, is that fair?
A. Yes, sir
Q. Okay. Do you recall what Ms. Courtney's response was to your offer?
A. There was negotiation. I don't remember the interaction.
Q. Was it all in one phone call or multiple phone calls?
A. No, sir, there were multiple phone calls
Q. Okay. After you made your offer, did she say, I'll have to get back with you and call you back?
A. All I remember is there were multiple phone calls back and forth
Q. Okay. And did all of this take place in one day?
A. Yes, sir
Q. Okay. Do you generally recall over what time period, how many hours or –
A. It was late afternoon.
Q. Was it a weekend?
A. It was a Friday afternoon.
Q. And did you talk with anyone other than

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Ms Courtney?
A. No, sir
Q. And eventually in this back and forth phone calls, did you reach an agreement on price?
A. Yes, sir
Q And then did you come into the dealership to finalize the paperwork?
A. After I did my credit ap and got my financing in order
Q. From the credit union?
A. Correct.
Q So did you come into the dealership with a cashier's check from the credit union?
A. I came in with some paperwork that they needed to fill out, and the credit union verified the funds would be sent to them.
Q The credit union --
A. Verified the funds would be sent.
Q So you didn't have a check?
A. I did not have a check.
Q And I assume you signed a promissory note or financing agreement with the credit union?
A. Yes, sir
Q Do you maintain -- still have a copy of that?

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A. Probably so
Q Are you still making payments on it?
A. She is, yes, sir
Q So your daughter is making the payments?
A. Yes, sir
Q Who was the -- were you the borrower on the financing agreement, or were both of you, or how was that arranged?
A. She co-signed with me
Q Okay Do you recall whether -- did you enter into any other agreements with the credit union? Did they offer you any sort of service agreement on the car or anything like that?
A. No, sir
Q Did the financing agreement that you signed with the credit union contain any arbitration clause?
A. I do not know
Q. Did you check with the dealership as to whether they could give you a better interest rate than the credit union was giving you?
A. I like my credit union and past expenence, their rates have always been very, very competitive
Q When you came into the dealership with your

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paperwork from the credit union, did you engage in any further negotiations with Ms. Courtney, or had that been resolved at that point?
A. It had been resolved, to the best of my knowledge
Q And was your daughter with you?
A. Yes, sir
Q And was this -- how many days after the back and forth on the phone was this, or was it the same day?
A. I think we came in like Monday, Tuesday of the following week. I can't remember exactly
Q And do you recall whether -- how many dealership employees did you deal with when you came into the dealership on the following Monday or Tuesday, do you recall?
A. One. There was the finance and insurance guy
Q. Okay Did you -- was Ms Courtney there?
A. I don't remember
Q Okay So you -- as best you recall, the -- you went back and dealt with the F and I manager?
A. Yes, sir
Q And was that a male or a female?
A. Male.

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Q. Do you remember his name?
A. No, sir
Q. Did that gentleman attempt to sell you any further products beyond the car?
A. Yes, sir
Q Did he attempt to sell you a number of products beyond the car?
A I think so.
Q. Let me show you a document I'll have marked as Michael Watts Exhibit 1 It's actually a collection of documents
(Defendant's Exhibit 1, Dealership transaction documents, was marked for identification)
BY MR. BLACK
Q And Watts Exhibit 1 is Bates Numbered CBM 501 through 45. And if you could thumb through that exhibit, Mr Watts, can you confirm that those are the documents you were shown Sunday night?
A. Yes, sir
Q If you could turn to the second page of the Exhibit, which is CBM-00002. Five 0's Do you see -- and this is a document entitled Century BMW Menu of Investment Enhancements Do you see that?
A. Yes

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Q And is that your signature down at the bottom right-hand corner?
A Yes sir
Q And were you shown this document by the F and I manager?
A Yes, sir
Q Does the name Corey James ring a bell as to the name of the F and I manager?
A I don't remember, sir
Q And did Mr James go through this document with you?
A I don't remember
Q Do you -- you said you recalled him trying to sell you some products. Do you recall him trying to sell you a service contract/extended warranty?
A We wanted that, yes, sir
Q You wanted an extended warranty?
A Yes sir
Q Did you purchase one?
A Yes sir
Q Did you purchase it from the dealership?
A Yes, sir
Q Okay You sure?
A I thought we did
Q If you turn to the next page, you see the

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car was still covered by the BMW warranty?
A We bought -- excuse me We bought the extended warranty after the car was -- came out of warranty I knew we had an extended warranty
Q Okay
A I apologize there.
Q So in the -- when Mr James or the F and I manager went through the products with you, you didn't buy an extended warranty on the day you purchased the car?
A Correct
Q But you did buy an extended warranty sometime thereafter
A Yes, sir
Q And from -- did you buy it from the dealership?
A Yes, sir
Q Okay But at the time of your sale, you turned him down on buying it
A Yes sir
Q Okay So I take it you knew it wasn't a requirement of purchasing a vehicle at Century BMW that you enter into a service agreement with the dealership
A Correct

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Q Did he also try and sell you this tire and wheel guaranty that's referenced on the form?
A That's the one I remember
Q Okay
A Yes, sir
Q And you didn't purchase that?
A No
Q Okay Did he try and sell you this upgraded maintenance agreement referenced here in the middle column, the top?
A I don't think -- the upgraded maintenance agreement, he discussed it, and it's the one we came back and bought later
Q Okay And I notice here that someone has scratched through the 1695 and written 1395 by hand Do you see that?
A Yes, sir
Q And in trying to convince you to purchase this item, did he offer to lower the price from what was on the menu?
A He must have.
Q So I take it you understood that these various items the price was negotiable on them?
A No, sir, not really
Q But you did understand that it wasn't a

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requirement of purchasing a vehicle that you enter into any of these agreements referenced on the form.
A Yes, sir
Q And down at the bottom of the page, is that your handwriting that says, declined coverage, or is that the F and I manager's?
A That's the F and I manager
Q And you signed next to that?
A Yes sir
Q Do you recall how long after you purchased the car you came in to buy the service agreement?
A It was before the 50,000-mile warranty ran out.
Q So it was some number of months after you purchased the car?
A A good number of months, yes, sir
Q How long do you recall him pitching these products to you for?
A I can't remember how long.
MR BLACK Can we take a break?
MR THOMAS Yeah, I was about to ask
(A recess transpired)
BY MR BLACK
Q You mentioned that your daughter was roommates with Ms Blease. That was in college?

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A. Yes, sir
Q. And did your daughter graduate from college in 2005?
A. Christy graduated in 2004, I believe
Q. Okay. So it was the year -- it was a year after she graduated that you purchased the car?
A. She graduated -- she finished -- she stayed down there and finished her master's, so maybe it was 2005
Q. Okay. And had she been rooming with Ms. Blease up until she got her master's degree?
A. Yes, sir
Q. Was she --
A. Up to a point. She -- I don't exactly remember. I think her last year she lived by herself
Q. So as you understood it, she had been a roommate of Ms. Blease up to sometime in -- when did she stop being Ms. Blease's roommate, as you understand it?
A. Christy had roommates, and the biggest thing I remember is having to move her all the time. Okay? I think Christy roomed with Melanie Blease 2003, 2002, somewhere like that.
Q. And did they remain friends after they

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stopped being roommates?
A. Yes
Q. And are they still friends?
A. As far as I know, yes
Q. And do you know if Ms. Blease -- do you know when she graduated, if she's graduated?
A. No, sir
Q. Okay. Do you know, while she was at school with your daughter, was she working for the law firm at the same time?
A. I don't think so. I know Melanie has always held jobs, but I don't know where she was working.
Q. Okay. So she may have been working for the law firm, you don't know one way or the other?
A. I don't know
Q. Okay. You said you purchased the service agreement after you purchased the car
A. Right.
Q. And I think you said you purchased it before the car hit the 50,000-mile mark?
A. Correct.
Q. At the time you purchased it, was the car approaching the 50,000-mile mark?
A. Yes, sir

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Q. If you turn to Page 000005, do you see that's an Affidavit and Notification of Sale of Motor Vehicle?
A. Yes, sir
Q. And do you see that there's a certification that the odometer, at the time you purchased the vehicle, read 15,514?
A. Yes, sir
Q. So I take it if the car was approaching 50,000 miles at time you bought the service agreement, it was a significant period of time after you purchased the car
A. Yes, sir
Q. And someone had put approaching 30,000 miles on the car in the interim?
A. Yes, sir
Q. So I take it it was over a year after you bought the car?
A. Yes, sir
Q. So it was after this litigation was filed
A. Before the litigation was filed.
Q. Well, you bought the car in June of '05, is that right?
A. Yeah.
Q. And this litigation was filed in August of

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'05?
A. Okay. It had to have been. I'm not good on dates. I apologize. I don't -- I am not good on dates, trying to time line everything.
Q. Okay. It -- but would you agree that it's likely you bought the service agreement after you -- after the litigation was filed?
A. Yes, sir
Q. When you met with the F and I manager, where in the dealership did you meet with him?
A. In his office
Q. And was that a cubicle-type office off the showroom floor?
A. Yes, sir.
Q. And did you meet with him alone, or was Christine with you?
A. Christine was with me
Q. And was she there the whole time?
A. With the F and I manager?
Q. Yes
A. Yes, sir
Q. And do you recall how much time elapsed from the moment you walked into the F and I office until you left?
A. I do not remember

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Q. Was it over an hour?
A. I tried to keep it as short as possible.
Q. Okay.
A. So I don't -- I don't remember.
Q. You wanted to get in and out as quickly as possible?
A. Correct. Yes, sir.
Q. So was it likely less than an hour?
A. Yes, sir.
Q. And what was your impression of the F and I manager? Was he a nice guy?
A. He seemed like an all right guy.
Q. He didn't put any undue pressure on you?
A. No, sir.
Q. And to the extent he tried to sell you things, you didn't buy them, at least at the time.
A. Correct.
Q. Did you sign some documents while you were in the F and I office?
A. Yes, sir.
Q. Do you know how many?
A. No, sir.
Q. Do you have an estimate of how many?
A. Five, six.
Q. So it wasn't some huge stack of documents

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you had to sign; it was just a handful.
A. There were copies and stuff. That's all I can remember.
Q. Okay. But you don't remember having to traipse through some enormous stack of documents?
A. Not a huge stack of documents.
Q. And were the documents such things as transferring title to the vehicle and the like?
A. Yes, sir.
Q. And those documents, you understood were required by law?
A. Yeah, they were all -- all the documents were right there together.
Q. And the documents you were given to sign, did Mr. James do anything to prevent you from reading them?
A. No, sir.
Q. And if you'd turn to Page -- the page that ends in 14. And do you see that that's a document that is titled, in all caps and bold print at the top, Arbitration Agreement?
A. Yes, sir.
Q. And would you agree with me that the heading of the document is easy to read?
A. Yes, sir.

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Q. And the -- at the bottom of the page, have you signed the document?
A. Yes, sir.
Q. And right -- right above you, where your signature is, do you see in bold, all caps, it says By signing below, the parties acknowledge that they have read and agreed to the terms of this arbitration agreement?
A. Yes, sir.
Q. And do you agree with me that that's easy to read?
A. Correct.
Q. And immediately above that, there are a number of bullet points that are also in all caps?
A. Yes, sir.
Q. And that's in perfectly readable type?
A. Yes, sir.
Q. And, in fact, the entire document, while the other type on the page may be somewhat smaller, none of it is difficult to read if one wanted to?
A. Correct.
Q. I think we said that's your signature in the bottom left-hand corner in the top signature line?
A. Yes, sir.

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Q. And is that your daughter's signature below that?
A. Yes, sir.
Q. And that's the -- Mr. James' signature to your right?
A. I would assume so, yes, sir.
Q. And this document was presented to you at the dealership when you were meeting with Mr. James?
A. Yes, sir.
Q. What, if anything, did Mr. James say to you when he presented you with this document?
A. I don't remember if he said anything.
Q. Did you see, when he handed you this, that it said arbitration agreement at the top?
A. I did not really pay it any attention, because they weren't doing any financing for me. We were eager to get the car.
Q. So you were here to just get out of there.
A. Yes, sir. All the papers were together, and he handed me all the papers.
Q. Okay. But he didn't do anything to prevent you from reading what he handed to you.
A. No, sir.
Q. Do you recall one way or another whether you did read it?

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A. I did not read it, no, sir
Q. Did you glance your way down and at least read the things in all caps?
A. I don't even remember signing it. Because all the papers were together
Q. So I take it you don't remember him telling you that you had to sign this document in order to purchase the vehicle?
A. No, sir
Q. And I take it, from what you've said, you didn't object to signing the document at the time.
A. I didn't know I didn't have to.
Q. But you didn't say, I don't want to sign this to Mr James, is that fair?
A. No, I did not say that.
Q. Okay
A. No, sir
Q. And you didn't raise any complaint about the document at the time?
A. No, sir
Q. And you didn't ask any questions about whether it was required that you sign the document?
A. No, sir
Q. And I take it the same -- all of those questions same is true of your daughter?

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A. Yes, sir.
Q. Okay She didn't ask any questions about the document?
A. No, sir She wanted the keys
Q. Okay The credit union you financed the transaction through, what was the name of the credit union?
A. Carolina Collegiate Federal Credit Union
Q. Did you finance the purchase at Toyota of Greenville through the same credit union?
A. Yes, sir
MR. BLACK. Can we take a break?
MR THOMAS Yeah.
(A recess transpired)
BY MR BLACK.
Q. At the time of your purchase from Century BMW, how many cars did you and your wife and your daughter collectively own?
A. We owned -- we bought this car We owned two
Q. Two in addition to this car?
A. Yes sir
Q. Okay And what cars are those?
A. One was a Honda
Q. And who primarily drove the Honda?

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A. My wife
Q. And what other car was there?
A. I'm trying to think what I was driving Because I've had so many company cars over the years, and they change those out so much that --
Q. Who drove the vehicle you purchased at Toyota of Greenville?
A. I did
Q. Okay
A. I'm trying to remember the dates, if I had that car or not at that particular time, or if I had a company car. I think I had the Toyota.
Q. Okay Was Christine driving a car prior to the --
A. Christy had a Montero Sport.
Q. That's a Mitsubishi?
A. Correct.
Q. And how long had she been driving that car?
A. Three years. Four years
Q. And was that car still in working order at the time of the Century BMW --
A. Yes, sir
Q. -- transaction?
A. Yes, sir
Q. Okay So aside from wanting a nice -- I

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realize it's a used vehicle but a nice new vehicle, she wasn't under any pressure to replace her car because she didn't have a working car at the time
A. Correct.
Q. And you didn't trade that car in.
A. No, sir
Q. What did -- what did you do with that Montero Sport?
A. Sold it to an individual.
Q. Okay And you did that through the Internet or something?
A. Through a little car lot.
Q. And would you agree that if all that you needed was transportation around town, while that might be necessary here in South Carolina, there's no necessity of buying a luxury BMW automobile?
A. For just transportation, I agree
MR. BLACK That's all I have
THE WITNESS Okay
MR. THOMAS I don't have anything
MR. BLACK Okay
(The deposition was concluded at 10 36 a.m)

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SIGNATURE OF DEPONENT

I the undersigned, MICHAEL WATTS, hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any

PAGE LINE CHANGE REASON

_____

MICHAEL WATTS DATE

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CERTIFICATE OF REPORTER

I, Kathy P Taylor, Registered Professional Reporter and Notary Public for the State of South Carolina at large, do hereby certify that the foregoing transcript is a true, accurate and complete record

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof

WITNESS MY HAND, I have hereunto affixed my official seal this 31st day of January 2008 at Greenville County, South Carolina.

_____

KATHY P TAYLOR
REGISTERED PROFESSIONAL REPORTER
MY COMMISSION EXPIRES
JUNE 13, 2017

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STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF AIKEN

HERRON, et al.,

Plaintiffs,

Case No.
2006-CP-02-1230

vs.

DICK DYER & ASSOCIATES, INC., et al,

Defendants.

DEPOSITION OF: JOHN ROBERT BISHOP

DATE: January 30, 2008

TIME: 10:07 a.m.

LOCATION: LEATHERWOOD WALKER TODD & MANN, P.C.
300 East McBee Avenue, Suite 500
Greenville, South Carolina

TAKEN BY: Counsel for Defendant,
CENTURY BMW

REPORTED BY: KATHY P. TAYLOR,
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ALISON DANNERT, Paralegal

(Index at rear of transcript)

STIPULATION

It is stipulated by and among Counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, Rule 30; that all objections as to Notice of this deposition are hereby waived, that all objections except as to form are reserved until the time of trial, and that the deponent does not waive reading and signing of this deposition.

* * * * * * * * * * *

JOHN ROBERT BISHOP,
Being first duly sworn, testified as follows:

EXAMINATION

BY MR. LEWIS:

Q. And you're Mr. Bishop, they tell me.
A. Yes, sir.
Q. Well, I'm required to tell you a couple of things. Have you had your deposition taken before?
A. No, sir.
Q. Okay. Well, then, listen up. So when you give an answer, they're going to write it down, and so you've got to make sure you understand my question.
A. Yes.
Q. So if you don't understand it, you ask me

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to explain it or whatever, and I will try to make sure that it's an understandable question. Is that fair?
A. Yes, sir.
Q. Now, if I cut you off, because I get excited, you say, I'm not finished, and I will let you finish. Or if I'm – if I'm making you mad, you say, I'm making you – you're making me mad, and I'll try to change the way I'm doing things so I don't make you mad. Does that make sense?
A. Yes, sir
Q. Now, you're going to give answers to questions that I give, and she's going to take them down. You don't get to ask me questions, thank goodness. So just understand that.
Now, have you been explained about reading and signing your deposition?
A. No, sir.
Q. Okay You have the right to read your deposition and make corrections to it, like the spelling of your name or the spelling of somebody else's name. You don't get to change yeses to nos, but, you know, so you can read and sign it to make sure that it's what you think you said. But that's up to you whether you want to do that, and you can

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ask your lawyer if he would like you to do that. And you need to tell her at the end of the deposition so she can get you the deposition copy and you make whatever corrections you want.
MR. BLACK: He will read and sign, but I object to your instructions to the extent it misstates the law and what changes he can make, but go ahead.
MR. LEWIS: You ob- – I'm sorry You were talking –
MR. BLACK: Object to what you instructed the witness.
MR LEWIS: You were talking to the table. If you'll talk to me, I'll be able to hear you
MR. BLACK: I said I object to your instruction to the witness to the extent it misstates the law as to what changes you can make in your deposition
MR. LEWIS. That's fine I just don't think you can change yeses to nos; but if you think so, that's fine with me If you want to do that, that's okay with me, too
Now, you ready?
THE WITNESS: Ready
BY MR LEWIS:

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Q And what's your full name?
A. My name is Bobby Bishop. Bobby is a nickname. John Robert Bishop is my legal name.
Q. And where do you live?
A. I live in Simpsonville, South Carolina
Q Do you know a Mr. Hawkins that lives in that town?
A. Don Hawkins?
Q. Bill Hawkins.
A. No, sir.
Q Okay. Now, what do you do?
A. I'm the general manager at Century BMW
Q. General manager. Okay Have you – you know you've been designated as the person that's most knowledgeable about certain items that we asked that the Century BMW produce; do you understand that?
A. Yes, sir.
Q. And I'm going to show you Exhibit Number 1, which is our Notice.
(Plaintiff's Exhibit Number 1, Notice of Deposition, was marked for identification.)
BY MR LEWIS:
Q And this is the Notice. If you would turn to Page 2, you will see the areas that we're

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interested in Do you see the person or persons most knowledgeable regarding A, B, C, and D?
A. Yes, sir.
Q. Which one are you – have you been identified to address?
A. A, B, C, and D.
Q So you're the only one that's here
A. Yes, sir
Q. So you've been designated for all of them.
A. Yes, sir.
Q. Had you seen those l- – topics before?
A. Yes, sir.
Q. Who is the person second-most knowledgeable for each of those items?
MR. BLACK: Object to the form. You can answer.
THE WITNESS: I'm sorry?
MR. BLACK: I said objection to form You can answer
THE WITNESS: Oh.
BY MR LEWIS:
Q He'll say that a lot, object to the form, but that just means that you get to answer, and he's just putting it on the record
A. Okay.

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Q. It doesn't allow you not to do it or anything.
A. Corey James.
Q. Corey James? And he would be the same -- he would be for all of them, like you?
A. Yes, sir.
Q. Okay. Now, have you talked to anybody about each of these topics?
A. Yes, sir.
Q. Who?
A. Corey James and Elizabeth Courtney.
Q. And why did you talk to Elizabeth Courtney?
A. She was the salesperson
Q. And when you talked to Corey James and Eliz-- Corey James, did you talk to him with any documents, or was it just talking to him?
A. Just talking.
Q. And what did you talk about?
A. I asked him if he remembered this deal, the Watts deal.
Q. And did he remember?
A. Specifically, he did not.
Q. And so did you then stop talking?
A. I mean, if he didn't remember the deal, I asked him what his procedures were at that time.

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Q. And what did he tell you his procedures were at that time?
A. You -- I'm talking about the way he rolls off the paper. Which is a car term; you know that.
Q. What?
A. Rolls off the paper. He presents the paper
Q. Yeah. How does he roll off the paper?
A. He presents it one piece at a time to the customer
Q. That's what he said?
A. Yes, sir
Q. And did he tell you that he presented them in a stack with little flags on them?
A. No, sir.
Q. Does he ever mention he put flags on them?
A. He said he did not put flags on them.
Q. Oh. So we have a difference of opinion between the buyer and the seller.
MR. BLACK: Object to the form of the question
A. Apparently.
BY MR. LEWIS.
Q. Apparently?
A. Apparently

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Q. You know that now, don't you?
A. Yes, sir.
Q. Because someone -- were you at the deposition yesterday?
A. No, sir.
Q. So someone talked to you about the deposition.
A. Yes, sir.
Q. And they told you that the buyer said that there was a stack and that there were flags on them
A. Yes, sir.
Q. And then when you went to Corey James, was that before or after you had that -- knew that yesterday they talked to -- they said that there was flags on the documents? Did you talk to Corey James about his procedure before or after?
A. I talked to him before --
Q. Yeah.
A. -- and after.
Q. Okay. When did you bring up the flags to him?
A. This morning.
Q. And you asked him if that was true?
A. Yes, sir.
Q. And he said no?

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A. Yes, sir.
Q. Before that, you didn't ask him?
A. No, sir.
Q. No, sir, you -- that's a hard answer Before that you did not ask him; is that correct?
A. I did not ask him before.
Q. Okay. Did he tell you he ever used flags?
A. He stated that he never used flags.
Q. Never used flags. Okay. With any customer?
A. That's what he stated, sir.
Q. All right. Good. All right. Now, did you -- what else -- okay. Before yesterday, before yesterday, what else did Mr. Corey James say?
A. Basically he stated he didn't remember this deal at all.
Q. Okay. What did he say about his procedures --
A. I --
Q. -- other than he presented them, what did you say, a document at a time?
A. Yes, sir, that's exactly what he said.
Q. Anything else?
A. No, sir.
Q. Did he say what he said to the -- to the

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people?
A He doesn't remember them, sir
Q. Does he say what he generally – is there some procedure where they have a specific spiel, you know, like – you've heard spiels before You know that
A He would – his procedure was to present each piece of paper and put his finger where they needed to be signed –
Q. Okay
A. – individually.
Q. All right. And did he say anything about the pages, or just point to them?
A. He would explain the pages and point to the signature.
Q Did he say he explained the pages?
A. Yes, sir
Q. Did he say that before yesterday or after yesterday?
A. He said that before yesterday.
Q Okay. Anything else did he say besides pointing where to sign and explained the paper?
A. No, sir.
Q. Anything else?
A. No, sir.

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Q. Okay. Now, we'll get to the –
MR. LEWIS: Where's the arbitration agreement?
(Plaintiff's Exhibit Number 2, Arbitration Agreement, was marked for identification)
BY MR. LEWIS:
Q. You understand that Exhibit Number 2 is the arbitration agreement that – in this deal, as you call it
A. Yes, sir.
Q. And it's – and this is one of the pieces of paper that had been rolled out?
A. Yes, sir.
Q. And this is one of the papers, according to Mr. James, that he would have pointed at and told them where to – that they should sign that.
A Yes, sir.
Q. And what did Mr James say he explained about this document, Exhibit Number 2?
A. I did not ask him what he explained with the documents.
Q. You didn't?
A No, sir.
Q. So you don't know?
A. No, sir

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Q. And there's no procedure that you tell them what to explain?
A. We practice full disclosure.
Q. Well, what do you disclose? What do you tell them to disclose about this?
A. We tell them to go over the form and tell them exactly what it contains.
Q. Well, what? What does this form contain? Can you sit here and tell me what this form contains?
A. I'm not an expert, but I can tell you that this is a document providing remedy for the customer without having to go to court.
Q. Is that what you tell them when you explain –
A Yes, sir.
Q. If you were to explain it, that's what you would say?
A. Yes, sir.
Q. Is there anything else you'd tell them, other than it's a remedy for the customer and you don't have to go to court?
MR. BLACK: Object to the form. You can answer
A. No, sir, I would tell them nothing else.

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BY MR. LEWIS:
Q. Okay. And is that what you expect your employees to tell the – the people?
A. They're more informed than I.
Q. Well, is that what you expect them to tell them, at least that?
A. At least that.
Q. Okay. Is there anything else you expect to tell – them to tell them?
A. No, sir.
Q. All right. Anything else you talked to Mr. – did we cover everything you talked to Mr. James about?
A Yes, sir.
Q. Now, what did you talk to Ms Courtney about?
A. I talked to her about the deal itself.
Q. Did she remember the deal?
A. She did not.
Q. What did she say about the papers that were rolled out?
A We talked about the arbitration and the – I mean, she – she basically doesn't handle any of that paperwork as far as the arbitration and stuff would go, so she had no knowledge of what the Watts

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said in the office, the F and I office, or nothing.
Q Well, what is she? She – I thought she was the salesman.
A Yes, sir, she is the salesperson, but all these transactions are conducted in the F and I office.
Q So the salesperson doesn't do any of the roll out of papers.
A No, sir
Q. So she just tries to sell the car; and then when she says okay, there's a point in the sales process, I got to get them into the guy that rolls out the paper.
A Yes, sir, exactly right.
Q. And when is it you get to go – you have to go in to roll out the paper? How long and where in the process does that happen?
A At the very end
MR. BLACK Object to the form.
BY MR. LEWIS:
Q. Huh?
A At the very end of the process.
Q. So you've already negotiated a price at that time?
A. Yes, sir.

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Q And then you roll – you go in, and they roll out the paper.
A Yes, sir
Q And all – Ms. Courtney doesn't explain any of the papers to the people; that would be in Mr. James' area
A Correct.
Q Is Mr. James the one that explains it to all the customers, or are there more people that work for or under Mr James?
A At that time, Corey was our only F and I manager
Q The what?
A He was the only F and I manager, so he –
Q F and I?
A Yes, sir, finance and income manager
Q Okay And so he was the one that rolled out the paper
A Yes, sir
Q And – and you talked to Elizabeth Courtney, and did you talk to her both before and after yesterday?
A I have no reason to talk to her this morning.
Q. Okay And so you talked to her before, and

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she doesn't remember this deal, and she doesn't do any of the paper.
A. Yes, sir.
Q. So she has nothing to do with this arbitration at all.
A No, sir.
Q. Does she know what an arbitration agreement is? Is she ever schooled on it?
MR. BLACK: Object to the form.
A. As far as general knowledge, she does know about it.
BY MR LEWIS:
Q. Well, does she mention it, or do you tell her that she's supposed to tell the customer?
A. She's not supposed to tell the customer She has no reason to tell the customer.
Q. So she is specifically not to tell the customer about the arbitration?
A. Not specifically not. She has no reason to discuss it.
Q So you don't tell her to bring it up?
A. No, sir.
Q. Okay. When Mr. Courtney James has that piece of paper, the arbitration agreement, and he – you say he presents it to the customer

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MR. BLACK: It's Corey James
MR LEWIS: What?
MR. BLACK: It's Corey James. Courtney is the last name of the salesperson
MR. LEWIS. Corey?
MR. BLACK: Corey.
MR. LEWIS: Okay. Every time I said Courtney, I meant Corey.
MR. BLACK: I think you said Corey every time except that last time.
MR. LEWIS: Well, I appreciate you helping me out there
MR. BLACK. No problem
BY MR. LEWIS:
Q. Okay Mr. James. How about that? Mr James, when he does the papers – we've already talked about that. He does the arbitration paper. Does he tell them that they don't have to sign it?
A. No, sir
Q. Does he – when he points and tells them to sign here, does he say, this is where you have to sign?
A. No, sir
Q What does he say?
A. To my knowledge, he says nothing

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Q So he just -- he says what we said he said about the agreement, and then he puts his little finger down there, and that's supposed to indicate that they sign, and he doesn't say anything.
MR. BLACK: Object to the form
BY MR. LEWIS:
Q Is that right?
A I don't understand exactly what you're asking me here
Q Well, we told -- we already went over what he told -- what the minimum was he had to tell people, what you said.
A. Correct.
Q. All right. And you said that he points to where they sign
A. Yes, sir
Q. I want to know what he says when he points to where they're -- he -- they sign. Does he say, you have to sign here, sign here, or you don't have to sign, but we want you to sign? What does he say?
A I don't know his exact verbiage.
Q. Well, what did you all tell him to say?
A. Sign here.
Q. Okay. But he doesn't tell them they don't have to sign.

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A. No, sir
Q What if they won't sign?
A Then we still sell them the car
Q But you don't tell them?
A. No, sir
Q Now, how many people have refused to sign the arbitration agreement?
A I can't tell you an exact number.
Q Have there been any?
A. Yes, sir.
Q. Do you keep a count of them?
A. No, sir.
Q Do you flag the deal differently?
A. No, sir
Q. You just go right on through, and if it's signed, it's okay, and if it's not signed, it's okay.
A. Yes, sir.
Q. Why do you want them to sign it?
A I think it's good for the customer
Q. You do? Why do you think it's good for the customer?
A It's just, to me, a better way of settling differences
Q Than what, court?

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A. Yes, sir. Faster.
Q. It's faster, you say?
A. Yes, sir.
Q. And it's secret. Did you know that?
A. No, sir.
Q. You didn't know that?
A. No, sir.
Q. Do you know what the rules of the arbitration agreement are?
A. As pertaining to --
Q. How -- the process.
A. Vaguely.
Q. How you do it. Vaguely?
A. Yes, sir.
Q. Well, what are your vague understanding? Now, what's your job, you're the general manager?
A. Yes, sir.
Q. Okay. Does Mr. Courtney James know anymore about how arbitration works than you, or would you say you're better?
MR. BLACK. It's Corey James.
MR. LEWIS: Corey James. Mr. James.
A. I would say neither one of us would be involved in the process or actually been through the process.

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BY MR. LEWIS:
Q Or know anything about it?
A. Not much.
Q. Or what the rules are or what you have to do; do you know any of that?
A. No, sir.
Q. Do you know who has to pay for arbitration?
A. I understand that we pay a large percentage of it going in.
Q. Who -- who told you that?
A. It's in here.
Q. Did you know that before yesterday?
A. Yes, sir.
Q. Did you know it before a week ago?
A. Yes, sir.
Q. You just -- did you always tell the customer that?
A. No, sir.
Q. Now, you say a large percentage; what's the percentage difference you pay?
A. I think we pay up to $1500 to start it out, and then at some point we'll assume a lot more responsibility
Q. Does the customer have to pay any?
A. I can't answer that.

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Q. You don't know?
A. No.
Q Do you know how you choose an arbitrator?
A. No, sir.
Q Did you talk to anybody other than Mr James and Ms – Elizabeth about the deposition other than the lawyer?
A. No, sir.
Q We – that agreement, Exhibit Number – that's before you, it's Exhibit Number 2, how long has that been the arbitration agreement for your company?
A. That actual version, I cannot answer to that.
Q. Okay. Was it – how – is it the same version that it is now?
A From 2005 until now?
Q Uh-huh.
A. I would – I couldn't tell you.
Q Well, and how far back from 8/25/05 was this agreement being used?
A That actual agreement, I don't know. It has evolved over the years.
Q Well, who would know?
A. Sonic Automotive.

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Q Sonic Automotive?
A. Yes, sir
Q. It's hard to talk to Sonic Automotive. Is there somebody in particular?
A. Richard O'Connor.
Q Richard O'Connor?
A. Yes, sir.
Q Who is Richard O'Connor?
A. The national F and I director.
Q The F and I director?
A. Yes, sir, national.
Q. Well, we have a national F and I director, and that's who Mr. James would be under.
A Yes, sir
Q. Does it come – is he under you, or is he under this – what's his name?
MR. BLACK: I assume you're – I don't mean to – I assume you're asking back in 2005?
MR. LEWIS: Well, I'll ask – if you want me to, I'll ask in 2005
A In 2005, Corey would have worked directly for me, and he also would have worked for Richard O'Connor indirectly.
BY MR LEWIS
Q. Is that different now?

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A. No, sir.
MR. BLACK: Mr. James doesn't work at the dealership anymore, which is why I made the objection, but –
BY MR. LEWIS:
Q. Where is Mr. James?
A. I understand yesterday he left the company, so I have no idea where he is now.
Q He left the company yesterday?
A. Or I heard it yesterday that he left the company.
Q Where does – where do you work?
A. I work for Century BMW in Greenville.
Q And where does this Corey – this guy named Mr James work?
A. His last position was in a Sonic store in Charlotte, North Carolina.
Q. And when it – when – in 8/25/05, he was in your store?
A. Yes, sir
Q And he was moved from your store up to someplace in Charlotte?
A. Yes, sir.
Q. And he left Charlotte yesterday?
A. I heard that he left Charlotte yesterday.

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I don't know exactly what day he left.
Q. I thought you talked to him after the deposition.
A. I didn't ask him.
Q. Wait a minute. I got to understand this. You called him after the deposition, right?
A. Yes, sir.
Q. And – but you didn't ask him where he worked?
A. No, sir.
Q. Did you know at the time he didn't work for Sonic?
A. Yes, sir. This morning.
Q. And – but you called him. Where did you call him?
A I called him on his cell phone.
Q. And you didn't say, hey, where are you working now or what are you doing?
A No, sir
Q Why wouldn't you – that's just befuddling to me. That's just – you just didn't care.
A. No, sir.
Q. You didn't care.
A. No, sir.
Q. You don't like that guy?

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A I like him, but I don't care where he's working
Q. Huh Where is his cell phone number?
A. It's in my car.
Q. Your car?
A. Yes, sir.
Q. Would you mind giving us that?
A. (704)577 – wait a minute.
MR. BLACK: Let me consult with co-counsel.
A. I may. I may.
(A discussion was had off the record and out of the hearing of the court reporter.)
MR. BLACK: Go ahead.
BY MR. LEWIS:
Q 705 what?
A. 704
Q. Oh, okay.
A. (704)577-5935.
Q. Okay. How many cars per year does BMW sell?
A Approximately –
MR. BLACK: BMW?
BY MR. LEWIS:
Q. Century
A. Approximately 1200.

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Q And since 2005 or – 5, since this agreement here, how many of those cars did anybody refuse to sign an arbitration agreement on?
A I don't know that number, sir
Q. Do you know of one?
A. Yes, sir.
Q. You do?
A. Yes, sir.
Q. Who was that?
A. Brad Martin
Q And who is Brad Martin?
A. Our attorney
Q Oh Okay Now, give me one more
A I cannot give you another name.
Q Okay. Thank you. Is it – the fact that you use arbitration agreements is something that Sonic, above you, makes that decision; it's not the decision of your store?
A. That's correct.
Q. Huh?
A That's correct
Q. So there's some higher-up, this – what was his name, Mr –
A O'Connor
Q Yeah, Richard O'Connor. And his – now, does he send down a – is there some kind of booklet that they send down or a manual that they send down telling everybody how to go through the rolling of paper, how you do it, what you do, what they're for; is there some I could go get it?
A. No, sir, it's all done in training classes
Q. In training classes where?
A. Various places. Atlanta, Charlotte.
Q. Is all the training the same?
A. Yes, sir.
Q. So you would think, then, just logically, that there is somewhere there is a training manual.
A. I don't have one in my possession.
Q. I know you don't, but –
A I don't know of one.
Q. Well, how – when they go up there, do they have little – you know, this is the age of PowerPoint. Do you have little PowerPoints and they show a form and they tell about it? Have you ever been to these –
A. I've never been to a session for F and I.
Q. You never have?
A. No, sir.
Q. So I guess the person that would know that would be Mr. O'Connor?

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A. Yes, sir.
Q. And where is he located?
A. Charlotte, North Carolina
Q. Where?
A. It's Sonic headquarters. 6415 Idlewild is the address.
Q. You're pretty good on this stuff, remembering stuff. How old are you?
A. Do I have to answer that? 51.
Q. Pretty good for 51. So Sonic – Sonic, this – what do you call the headquarters, Sonic?
A. Yes, sir.
Q. Okay. Sonic, they make the decision to use the arbitration agreement.
A. Yes, sir.
Q. And you don't know why they made that decision.
A. No, sir
Q And you don't know what was the considerations in that.
A. No, sir.
Q. And as far as you know, there is nothing in your dealership that says that or gives an explanation or tells Mr James how to conduct his rolling of paper

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MR. BLACK: Object to the form.
A. You're talking about a written document that explains it?
BY MR. LEWIS:
Q. Uh-huh.
A. No, sir.
Q. Or -- or any kind of guidelines for him, how does he do it.
A. No, sir.
Q. How does he know -- there's a packet of documents, isn't there?
A. Yes, sir
Q. And for every -- say, oh, this is what we call it, a packet, or you roll out this packet. Right?
A. Yes, sir.
Q. And the packets are the same for all sales.
A. No, sir.
Q. What's the difference?
A. Well, there's different kinds of contracts for different kinds of deals, lease versus retail.
Q. All right.
A. The basic paperwork would be the same.
Q. Okay.
A. But there would be different retail and

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lease contracts
Q Other than the retail versus lease, would the rest of it be the same?
A Yes, sir.
Q. Would the arbitration agreement be the same?
A Yes, sir
Q Now, so we know that there is a packet for a lease or a sale Let's suppose it's a sale This packet, do you keep the little packets together, like he grabs a packet, or does he have to go through and grab every one of them? How does it work?
A Each individual They're not stored as a packet.
Q. They're not. So he pulls them, each one of them, as individually.
A. Yes, sir.
Q. And then he goes and he sits down with the customer.
A. Yes, sir.
Q And according to your testimony, he shows it to them individually, and he points and does not use flags
A. Yes, sir

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Q And you don't know what he says or what explanations he makes.
A. No, sir.
Q. But you gave me the one that you would make and what you would expect to be the minimum
A. Yes, sir.
Q. So if I ask you about the agreement, who made the decision to do something like the class-action waiver, you wouldn't know anything about that, would you?
A. No, sir.
Q. You don't even know what a class-action waiver is.
A. Yes, sir.
Q. What is it?
A. You agree not to file a class-action lawsuit.
Q Well, do you think that's to the customer's advantage? You said you thought this was to his advantage. Is that -- is that one to the advantage of the customer?
A I really don't know, sir.
Q. Well, isn't it to the advantage of you?
A. No, sir.
Q. It's not to the advantage of the company?

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A. I wouldn't think so.
Q Well, why is it in there?
A. I have no idea.
Q. Have you talked to anybody about Exhibit Number 2?
A No, sir
Q. I take it that it's a form contract, the arbitration. I mean, it's a form document.
A Yes, sir.
Q And you all drafted the form, right?
A. Sonic Automotive drafted the form.
Q Oh, the high-ups sent it down to you and said, use this.
A Yes, sir.
Q. Do you know anything about the negotiations for buying this particular deal or going through with this deal?
A No, sir.
Q. Do you know how it happened?
A No, sir.
Q. Do you know if it was -- if there was any telephone conversations or it was all in store, how many visits there were; do you know anything about it?
A No, sir.

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Q. If I show you this, would you know this was the packet for this deal?
A. Yes, sir.
MR. LEWIS: Would you mark it? That's pretty good.
(Plaintiff's Exhibit Number 3, Dealership transaction documents, was marked for identification.)
BY MR. LEWIS:
Q. So if I look at Exhibit Number 3, that's the packet for this deal, which was a sale of the car, that would be the same packet that any sale would have.
MR. BLACK: Object to the form. You can answer.
A. Yes, sir.
BY MR. LEWIS:
Q. Turn to the last page there. It has the number on it of 04039. Do you see that down at the -- at the --
A. Oh, yes, sir.
Q. I want to make sure we're looking at -- we were looking at Exhibit Number 3.
MR. HAMM: Mr. Lewis, repeat the number you just referenced.

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MR. LEWIS: 4039.
MR. BLACK: It appears they added a number to the document in addition to our number. Page CBM-0000045.
MR. HAMM: Okay. Thank you.
BY MR. LEWIS.
Q. You see that packet?
A. Yes, sir.
Q. Just out of curiosity, turn to the front page. Did Brad Martin sign that front page?
A. No, sir.
Q. Huh?
A. No, sir.
Q. And did -- did Brad Martin agree to pay the document fee?
MR. BLACK: Object to the form of the question. I'll instruct him not to answer. That goes beyond the --
MR. LEWIS: Not to answer. Okay. That's fine.
BY MR. LEWIS.
Q. Did -- did -- he didn't sign that. Is there any other places he didn't sign?
A. When you're referring to Brad Martin, are -- we're talking about the Watts, correct?

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Because I don't have the Martin deal in front of me. I can't --
Q. You said Mr. Martin didn't sign an arbitration agreement. You told me that.
A. Yes, sir.
Q. And I'm asking did he sign the front page, the privacy notice, the front page, did he sign that page of his packet?
A. I can't tell you that. I'm sorry. I misunderstood. I cannot tell you.
Q. You remember the arbitration, but you don't remember this.
A. Yes, sir.
Q. But we could pull his packet and find out what he did, right?
A. Yes, sir.
Q. Okay. Because you have his packet somewhere.
A. Yes, sir.
Q. What does it say on arbitration -- the arbitration agreement in his packet, or is it just blank? You don't know.
A. (Witness shakes head.)
Q. Is that right?
A. I don't know.

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Q. All right. Let's look at that last page. It's got the All Cars Checklist. Right?
A. Yes, sir.
Q. And down there it says, Arbitration Agreement.
A. Yes, sir.
Q. That's on every deal.
A. Yes, sir.
Q. And it's a check. Either you check it or you don't, right?
A. Yes, sir.
Q. Is this just a reminder to Mr. James, or where does this -- this document go after it's completed?
A. This -- this document here is something we haven't used in a while. This is a checklist for the F and I manager, Corey James, to make sure that he's got everything in this package so it will go upstairs to the accounting department.
Q. Okay. Where -- so this form, this one, 04039, isn't used anymore.
A. Not this version, no, sir.
Q. Is there another version?
A. On the back of the deal jacket.
Q. On the back of the deal jacket.

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A. Yes, sir.
Q Well, that explains a lot to me. What is a deal jacket?
A. That's where all these documents would be placed.
Q Does that just mean a folder?
A. Yes, sir. It's a pre- –
Q. It's – huh?
A. It's a pre-printed folder with this checklist and some other checklists.
Q. On the – on the back of it.
A Yes, sir.
Q So when you put all this in the folder, they want to make sure they have all this in it.
A Yes, sir.
Q. And then this folder is kept in your dealership.
A Yes, sir.
Q. Is this checklist sent anywhere or it just sits there in – on the folder?
A. In the folder.
Q. In the folder?
A. Yes, sir.
Q. It's not sent anywhere?
A. No, sir.

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Q. Well, who reviews to see if the checklist is in there and properly done?
A. Corey would Corey James.
Q. Corey James would look at it?
A Yes, sir
Q. Well, he's the one that did it.
A. Yes, sir.
Q. So he'd look at the checklist that he did to see that everything in the checklist was done.
A. Yes, sir.
Q. Does anybody else look at it?
A. Accounting probably.
Q. Probably accounting So this – this – what do you call it, the deal folder would be sent to accounting?
A. Yes, sir.
Q. And they check it over, too, to see that all these things are in here.
A. Yes, sir.
Q. Now, what – what are they instructed to do if the -- with Mr Martin when he didn't sign the arbitration agreement? What do they do then?
A. Nothing
Q. Nothing?
A. Nothing

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Q. They just look?
A. Yes, sir.
Q. So this checklist, they just say, huh-uh, not signed.
A. It wouldn't state not signed.
Q. Well, it's blank.
A. Blank.
Q. And then they – they wouldn't do anything
A. No, sir.
Q You don't know anything about how the arbitration agreement was presented to the Watts, other than you – you say that Mr. James said it was each piece of paper was given to them, and he pointed to where to sign, that's all you know about the presentation of the arbitration agreement.
A. That is correct.
Q. You don't know anything that was said, anything else but that.
A. No, sir.
Q. And you're the man most knowledgeable. Do you have a record of how many arbitrations that you have – you have gone through with reference to the arbitration agreement?
A. I'm sorry. I didn't understand.
Q. You have an arbitration agreement there.

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A. Yes, sir.
Q It requires arbitration, you say.
A. Yes, sir
Q. Has anybody ever arbitrated with you?
A. I have one now.
Q One Is that the only one you can remember?
A. That's the only one that I've ever heard of
Q. Well, how long have you been with this company?
A 32 years.
Q. That's pretty good. So in 32 years, you haven't ever heard of another one except the one you have now.
A. Right.
Q What's the one you have now?
A. I can't remember the guy's name. It's Turner
Q What's he mad about?
A A paint defect on his car.
Q What kind of car was it?
A. It's a BMW.
Q. BMW. Did Mr. James leave on his own, or was he fired, or do you know?

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MR. BLACK: Object. Leave from where?
MR. LEWIS: He left from --
MR. BLACK: From Century BMW?
MR. LEWIS: He was up in -- he just told me.
MR. BLACK: In Charlotte? Okay.
BY MR. LEWIS:
Q. Charlotte.
A. Mr. James left on a mutual agreement. Corey's family was living in Charlotte. He was having to live in Greenville, and he needed to go back to Charlotte to his family.
MR. BLACK. That's why -- he's asking -- he's answering why he left Century BMW.
MR. LEWIS: I understand that. I'm not too bad. I can listen.
BY MR. LEWIS:
Q. All right. Do you know why he left Sonic in Charlotte?
A. No, sir.
Q. You don't know if he was fired or he left on his own?
A No, sir.
Q. All you know is he wanted to leave your company to go back to Charlotte because that's where

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his family was.
A. Yes, sir
Q. Well, did he come from Charlotte?
A Yes, sir.
Q. Did he come from Sonic of Charlotte?
MR BLACK: Object to the form
A. I really don't remember where Corey -- what his other job was before us. I really don't remember.
BY MR. LEWIS:
Q. This claim you have in arbitration, what -- where is it in the process?
A. It's just in beginning stages
Q. Someone just said they want -- they want to make a claim?
A. Yes, sir.
Q Did they sue you first, or did they just go into arbitration?
A. They sued us, and then it went into arbitration.
Q Who was the -- who is the lawyers involved; do you know?
A. Brad Martin.
Q. Brad Martin again, huh? He's the lawyer for you, or he's suing you?

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A. No, he's the lawyer for us.
Q. And who is the other guy?
A. I really don't remember his name, sir.
Q And it's up here in Greenville?
A. Yes, sir.
Q. And it's over a BMW.
A. Yes, sir.
Q. Have you told anybody else about this claim, this arbitration claim, other than me here today?
A. I'm sure quite a few of my employees know about it.
Q. Well, how about people out -- all your -- any customers or anything?
A. No, sir.
Q You don't tell that?
A. No, sir.
Q. You're frowning. Why are you frowning?
A. That wouldn't be a good business practice.
Q Wouldn't be a good business -- okay. And you don't know how you choose an arbitrator under your arbitration agreement.
A No, sir.
Q. You don't know anything about that.
A. I understand there's a board or a -- a

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panel that you call, and they assign them or whatever. But that's to the -- my extent of the understanding.
MR. BLACK. Cam, are you getting to a point where we can take a break soon?
MR. LEWIS: Sure, we can take a break now
MR. BLACK: Okay.
(A recess transpired.)
BY MR LEWIS:
Q. You've been with this company, I think you said 32 years.
A. Yes, sir
Q. And that company is what -- which company?
A. Century BMW
Q. All right. How -- did Sonic always own Century BMW?
A. No, sir
Q. When did they buy them out?
A. 1998.
Q Okay. Now, how long have arbitration agreements been -- been used?
A. I became general manager in 2002, and they were in effect then.
Q. How about before that?
A. I can't answer to that, sir.

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Q What were you before?
A I was parts and service director.
Q So as parts and service director, you didn't ever know what was in the packet?
A No, sir.
Q And in the -- you being appointed as the man most knowledgeable about the arbitration agreement, you never looked back in the history to see when it became any arbitration?
A No, sir.
Q Now, when did Mr James leave you, that is, Century BMW?
A To the best of my recollection, it was early 2006
Q. Now, you said he left on mutual terms or something like that.
A Mutual agreement.
Q. What does that mean?
A I decided and he decided that this wasn't the place for him to be at this time.
Q. Okay. Would it be fair to say you weren't happy with his work?
A I was happy with his work.
Q Well, then why -- why wasn't it good for him to be here?

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A. He was continuously late, but his work was very good.
Q. Okay. Now we got it. So he was late, but a good worker after he was late.
A. Yes, sir.
Q. Now, late, that means he just didn't come in five minutes, that would be real late.
A. No, sir. Five minutes, in my book, is late.
Q. Well, you're one of these people.
A. Yes, sir.
Q. You want them on time.
A. Yes, sir.
Q. So how -- how late would he be?
A. Five to ten minutes.
Q. And he would be five to ten minutes late over -- and how often?
A. At the end of his employment, it became more regular. Maybe twice a week, three times a week.
Q. And that just irritated you.
A. Yes, sir.
Q. And he was the -- is it finance and income or is it finance and insurance, F and I?
A I've always called it finance and income.

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Q You have?
A. Yes, sir.
Q. And you don't know whether it's finance and income or finance and insurance?
A. I've always called it finance and income.
Q. Okay. Fine And so with him coming in five, ten minutes late two times, three times a week, you decided maybe it would be better if he would go somewhere else?
A. He needed to go home.
Q. He needed to go home. And you made that decision he needed to go home?
A. And he agreed.
Q Okay. And did you get him a job then up there at Sonic?
A No, sir.
Q Where did he go when he went to Charlotte?
A. He went to Sonic when he went to Charlotte, but I did not get him the job.
Q. You didn't get him the job?
A. No, sir.
Q Well, how did he get a job back at Sonic when he left Sonic?
MR. BLACK: Object to the form.
A. I could only guess to that.

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BY MR. LEWIS:
Q. Well, guess at it.
MR. BLACK: Object to having the witness guess.
A. Networking.
BY MR. LEWIS:
Q. Networking.
A. Yes, sir.
Q. What was his job in Charlotte?
A. Previously?
Q. No, when he left you.
A. F and I. He took the same job in Charlotte that he left me.
Q. And went to another dealership?
A Yes, sir.
Q. What was the dealership?
A. Arnold Palmer Cadillac.
Q. Arnold Palmer Cadillac. And that's a Sonic dealership?
A. Yes, sir.
Q. And he was doing the same thing?
A. Yes, sir.
Q. Was he the only one in that dealership like he was in this dealership?
A. I don't know if he was the only one in that

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store or not.
Q. Okay. Do you have a new guy?
A. Yes, sir
Q. What's his name?
A. Rodney McCauly.
Q. And where is he from?
A He is from the Greenville area.
Q. So he just – did he come out of a Sonic store, or did he –
A. No, sir.
Q. You just went and found him?
A. I just went and found him.
Q. Did you know him?
A. No, I didn't personally
Q. Who did?
A. His former employer recommended him.
Q. Who was that?
A. James Brockman.
Q. And what – what's he?
A. He's a car dealer.
Q And what dealer is that?
A. Kia.
Q The – we talked about that class-action waiver in that agreement, Exhibit Number 2. Do you remember that?

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A Yes, sir
Q. Do you know when it was put in or –
A. No, sir.
Q. You just know that it's in there now?
A. I know that it's in there now.
Q. And you couldn't tell me if it was in there – and we know it was in there when – 6/25/05
A. Yes, sir.
Q. And it's been in there ever since
A. Yes, sir.
Q. But we don't know how long before 6/25/05 it was put in
A. No, sir
Q. As a general manager, you don't – do they – how many of those stacks of these – each of these pieces of paper in the packet, Exhibit Number 3, how many do they send you at a time, or do you run them off a Xerox?
MR. BLACK: Object to the form
A. We order them The exact quantity, I have no idea, in each package
BY MR. LEWIS.
Q. So you order them
A. Yes, sir.

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Q. And how do you order them? Do you order them by some – is there like – you know, sometimes they say this is Form Number 666. Is there – at the bottom, do you see – looking at Exhibit Number 3, do you see that?
A. Yes, sir.
Q. Do you see the long one, the first long one that comes out? It's called the Full Disclosure Customer Worksheet. Do you see that? It's the first one.
A. Yes, sir.
Q. And down at the bottom, it has a Form 814WS.
A. Yes, sir.
Q. You know what, if anything, that means?
A. That's the Austin Business Forms form number for this.
Q. Who is Austin Business Forms?
A. That's the supplier of this form.
Q. And so who makes – they just – they print them up?
A. Yes, sir.
Q. Where is this Austin Business Form place?
A. I have no idea.
Q. How do you know about it?

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A. It's one of our recommended vendors.
Q. So how do they know – is this a worksheet that – that Sonic tells you to use?
A. Yes, sir.
Q. And Sonic says that they got this form we want you to use
A. Yes, sir.
Q. And you buy it from them.
A. Yes, sir.
Q. I notice on the Arbitration Agreement, I don't see any form numbers.
MR. BLACK: Is there a question?
BY MR. LEWIS:
Q. Do you see that?
A. Yes, sir.
Q. Well, how do you order it?
A. It's probably – well, I can't attest to that, what I – how you order it. I don't order the supplies.
Q. Well, it doesn't have a form number. How do you know what to ask for?
A. Probably by title.
Q. Now by title. So you order by title.
A. If it doesn't have a form – a form number, you would order it by title

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Q. And where do you order the Arbitration Agreements from?
A. All of our ordering is done online through Sonic.
Q. Through Sonic?
A. Yes, sir.
Q. Is there something you bring up? What kind of screen do you bring up, what's it called?
MR BLACK. Object to the form
BY MR. LEWIS:
Q. Form order?
A. The exact system name is PECOS. P-E-C-O-S.
Q And when you bring up PECOS, what does it tell you?
A. It gives you the list of forms.
Q. Oh, and you just can order like that.
A. Yes, sir.
Q. And the – the form list, you see – let's go back to that last page again on Exhibit Number 3. Are the All Cars Checklist, are those all forms?
A. You're talking about each individual –
Q Yeah
A. – area? Some of theme are forms. Some of them are information.
Q. Okay. Well, let's look at the packet then.

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Look at the packet. Start with the first number, and that's 3995 Do you see that?
A. Yes, sir.
Q Is that a form?
A. Yes, sir
Q And do you order that?
A. Yes, sir
Q Is that a required form by law, or just a required form by Sonic?
MR BLACK: Object to the form. You can answer if you know.
A. This is a privacy notice It is required by Sonic and probably required by law.
BY MR LEWIS:
Q. All right.
A. It is required by law
Q. And the next one is – is this a form that you order?
A. No, sir. This is automatically printed out at the time the purchase is made, depending on what coverage the customer decides to or not to take
Q. And that's 3996.
A Yes, sir
Q. All right. Let's look at 3997 Is that a form?

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A. Yes, sir.
Q Is that a form that's required by law?
A. Yes, sir.
Q And you order those from that same place?
A. Yes, sir.
Q. Okay. Look at 3998. That's not a form, is it?
A. I have no idea what that is. A fax confirmation.
Q. Okay Look at 3999. That's – is that a form?
A. Yes, sir.
Q Is that one you order from the same place?
A. This one may not be. This one may be from the State of South Carolina
Q Okay. Is it a required form?
A. Yes, sir.
Q By law?
A. Yes, sir.
Q The next one is a vehicle history report, 4000
A. This is computer-generated from BMW.
Q. Okay How about 4001, is that part of the same report, or no?
A. This is – this is where we shipped a lien

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off to someone.
Q Okay. But that's not –
A. That's not a form, no.
Q. Okay. How about 4002?
A. This is a form.
Q. Is this a – required by law?
A. This is an agreement to provide insurance
Q. An agreement with who?
A. The customer and their insurance company.
Q. Okay. Do you – is that something that you require?
A. We do require it.
Q But is it – so this is a form of Sonic, not a – a form by law
MR. BLACK: Object to the form.
A. This is a form by Sonic.
BY MR LEWIS:
Q. Okay. And you order it?
A. Yes, sir.
Q. All right. How about 4003?
A. This is a computer-generated.
Q At your dealership?
A. Yes, sir This is built into our computer system, so this is the way it prints.
Q All Sonic dealerships have the same

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computer system?
A. Yes, sir, now we do.
Q. What is it called?
A. ADP.
Q. ADP. And 4004 would be another ADP-generated?
A. Yeah, the next three forms are the same form.
Q. Okay. How about -- how about now we're looking at 4007. We already talked about it.
A. Yes, sir.
Q. Now, is this form, when it comes, this full disclosure customer worksheet, is it long like this, or is it the same size of those other papers?
A. This form was long in 2005, and they changed it between 2005 and 2008. It's shorter now.
Q. It fits in to be like the other ones
A Yes, sir.
Q But it was long back then.
A. Yes, sir.
Q. Now, the next one is 4008, which is Exhibit Number, I believe, 2, as well as part of the packet.
A. Yes, sir.
Q And it's long
A. Yes, sir.

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Q. Was it long at that time, or was it --
A. Yes, sir.
Q. -- short?
A. Yes, sir.
Q. It was long.
A. Long.
MR. BLACK: And by long, you mean on legal-size paper?
BY MR. LEWIS:
Q. Is this -- looking at it, is this the size of the document, the original document?
A. Yes, sir.
Q. Do you know how many words are in this document?
A. No, sir.
Q. Would you believe me there was 1100?
A. Yes, sir.
Q. And the next one, 4009, is a --
A. Ordered form.
Q. A what?
A. Ordered form.
Q. Ordered. And it's -- but it's not required by law?
A. Car invoice may be required by law; I'm not sure of that.

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Q. Okay. Car invoice. Now, this one here, looking at 4009, this is a car invoice to who? Who is it an invoice to?
A. This one's an invoice to the Watts.
Q. And what does it tell you, that this is what they paid, 32,000?
A Yes, sir Yes, sir.
Q. And the 32,000 is made up of 31,375, plus 299.50, plus 300, plus 25?
A. If that adds up to 32,000, yes, sir.
Q. Well, okay What is total time price?
A. Oh, that would be if you financed it.
Q. If I financed it, it would be less?
A. It would be more, because of two lines above you would add your finance charge in.
Q. I'm con- -- I'm very confused. It has in here, number -- total time price. What is that? 31,700 50.
A. I don't -- what's that, 31 --
MR. BLACK: Let me just object that I think we've strayed beyond the topic in the Notice.
MR. LEWIS: Okay.
MR. BLACK: I'm giving you some leeway. The witness wasn't -- didn't come in prepared to analyze each of these forms in detail.

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BY MR. LEWIS:
Q. Okay. So you don't know what that is today.
A. Without a calculator and sitting down and figuring it out, probably not.
Q. Okay.
A. But I just don't know right this moment.
Q. Okay. 4010, is that -- what is that?
A. It's an ordered form.
Q. And ordered, we mean ordered from Sonic?
A. Yes, sir.
Q And is it required by law?
A. No, sir
Q The same as 4011?
A. Yes, sir.
Q And 4012 is something that was generated on your computer?
A. Yes, sir.
Q. And 4013, I don't know what that is. That must be something that's stamped on the back of something It doesn't matter.
A. I have no clue.
Q. And then you have pictures with people on them and an insurance card.
A Yes, sir.

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Q. And then you have another picture of a pretty lady. Do you see that of one?
A. Yes, sir.
Q. All right. That's 4015.
A. I saw that.
Q. 4016, that must come off of a computer?
A. Yes, sir
Q. 4017, what is that?
A. This is computer-generated, to do the tag work for the car.
Q Okay. And 4018 is a –
A. A copy of a check.
Q. Okay. 4019, that's – is that a form?
A. Yes, sir, that's an ordered form.
Q. Okay. And it's not required by law?
MR. BLACK: Object to the form.
A. The Retail Buyer's Order is required by law.
BY MR. LEWIS:
Q Okay. Required by law Now, if I – and is this form ordered?
A. Yes, sir. Yes, sir.
Q. And everything that's not written on it would – that is – that is, it looks typed, that would be on the ordered form?

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A. Yes, sir
Q. So every ordered form on BM – from Sonic will have the processing fee there?
MR. BLACK: Objection. And I'll instruct you not to answer. That goes well beyond the Deposition Notice to the merits of the case.
MR. LEWIS. You shouldn't have given me the form.
BY MR LEWIS
Q. The next one, 4020?
A. This is sent to us by BMW.
Q Is it required by law?
MR BLACK: Object to the form Go ahead
A. I have no idea.
BY MR LEWIS:
Q. How about 4021?
A. Continuation.
Q All right. And then the certificate of title, we know what that is, 4022. 4023 is a what?
A The back of the title.
Q Okay 4024, what is that?
A. That is a Form 400. This comes from the State of South Carolina
Q Is that required –
A. Yes, sir

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Q. – by law?
A. Yes, sir. It's required.
Q. And is 4025 required by the law?
A. Yes, sir. That's the back of Form 400.
Q Okay. 4026 is an internal form?
A. Yes, sir.
Q. And is this check requested, is that something that comes from Sonic, or is that just y'all's form?
A. This form comes – all our forms that are pre-printed come from Sonic.
Q. So this one comes from Sonic, too.
A. Right, yes.
Q. But it's not required by law?
A. No, sir.
Q. Same with 4027?
A. Yes, sir.
Q. 4028?
A. This is a BMW computer printout.
Q Okay. 4029?
A. Same.
Q. 4030?
A. Yes, sir. Same thing.
Q 4031?
A. Same thing.

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Q. Now, that's required by law, isn't it?
A. The odometer statement?
Q. Yeah.
A. This one is sent to BMW.
Q. But there is an odometer statement –
A. Yes, sir.
Q. – required by law?
A. Yes, sir, there is.
Q But this is not it?
A. No, sir.
Q. Okay. 4032.
A. That's a pre-printed form from Sonic.
Q. Is that required by law?
A. No, sir.
Q. And 4033?
A. Computer-generated, in-house form.
Q. 4034?
A. Computer-generated, in-house
Q. 4035?
A. The same.
Q 40 – I don't see it. It's cut off. It's CBM-0000042.
A. Right This is a computer-generated, a copy of the one we just went over that was handwritten.

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Q. Oh, that is a copy of that one he wouldn't let me ask you about.
A. Yes, sir.
Q. And this is -- the next one is 4037. Those are government forms?
A. These are county tax papers.
Q. And 4038?
A. That's a copy of a fax.
Q. And 4039 is that checklist we've already gone over.
A. Yes, sir.
Q. And this is essentially what a packet would look like for anybody that bought a car
A. Yes, sir.
MR. BLACK: Object to the form of the question.
BY MR. LEWIS:
Q. Now, if you had a -- if you were going to finance the car through you, would there be a finance packet, too, or would this packet, Exhibit Number 3, be bigger?
A. Exhibit 3 would be bigger.
Q. Was it -- and if you were going to lease a car, there would be just different documents that would support a lease, but it would be essentially

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the same documents otherwise?
A. Yes, sir
Q. Do you know -- we went through each of the documents in Exhibit Number 3. Do you know what the purchasers in this case were told about each of those documents?
A. No, sir.
Q. Do you -- what is the requirement you have on your F and I guy to explain each of the documents; does he have a requirement?
A. Yes, sir.
Q. And he's supposed to explain each one of them?
A. Yes, sir
Q. And how long -- how long does that take?
A. Oh, it could take, depending if the customer had any questions on each one, it could take five, ten minutes a form --
Q. Is that what --
A. -- if they had questions
Q. Well, what does it take normally? You've been in the business. Y'all sell 1200 cars a year. How long does it take to explain this packet? One guy, 1200 people
MR. BLACK. Object to the form. The packet

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contains a lot of documents that don't go to the customer.
MR LEWIS: Okay.
BY MR. LEWIS:
Q. Pick up Exhibit Number 3. And I want you to look through it and tell me each document that the customer is explained.
A. The privacy notice, the first one.
Q. All right.
A. The second one, which is the --
Q. Give me the numbers of them at the bottom.
A. Okay. Okay The first one is 3995.
Q. Uh-huh.
A. 3996.
Q. Uh-huh.
A. 3997 is explained on the sales floor This is a --
Q. Sales floor?
A. Yes, this is a document that's actually posted in the window of the car
Q. So that document is for the salesman to explain.
A. It's -- yes, sir.
Q But the F and I guy doesn't say anything about it?

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A. He will go over it again.
Q He will go over it again.
A. I'm going to skip 3998, because -- 3999 would be reviewed in the F and I office.
Q. Reviewed. Do they explain it to them or do they just review it? Do they have a requirement to explain it?
A. Well, yes, they would explain it. There's nothing but the sale-of-a-motor-vehicle form
Q. Okay.
A. 4002 would be explained and ask the customer for information specifically on this form.
Q. Okay.
A. Skipping ahead, 4008
Q. Yeah. We've already talked about that one.
A 4010.
Q. Uh-huh.
A. The printed version of 4019, the one we couldn't find the number on.
Q 4019?
MR. BLACK: I think the printed version was --
MR. LEWIS: Okay
MR. BLACK: The printed version is CBM --
BY MR. LEWIS

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Q. 4019 is gone through
A. Yes, sir
MR BLACK: Well, he said the pnnted version.
A. The printed version.
BY MR LEWIS:
Q. Yeah. Yeah I don't understand the pnnted version. 4019 is printed
A. The computer printed one, the one we could not find the -- the number on at the end.
MR. BLACK: It's CBM-000042. It's the one that your number got knocked off the bottom of.
MR LEWIS: 40 what --
MR BLACK: Four 0's, and then 42.
MR LEWIS: 42.
BY MR LEWIS:
Q. Okay It's got them all typed
A. Yes, sir.
Q. What do they do -- both of them are signed Why do they go through one and then type one?
A. The -- the handwritten one is generated out on the sales floor with the sales manager.
Q. Oh, the sales manager.
A. Yes, sir
Q. And so there's a new person that's been

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involved here. We had -- I thought it went direct from Mrs. Elizabeth to Mr. James. It doesn't? There's somebody in between?
A. The salesperson will confer with the sales manager to get his signature, approval to sell the car.
Q. So the -- I got -- I got to understand something. So this Exhibit Number -- Exhibit Number -- hold on -- 3, 4019 --
A. Yes, sir.
Q -- that's done on the floor.
A. Yes, sir
Q. Now, is the sales manager's signature on that document?
A Yes, sir.
Q. And so they sit down there, and this is negotiated, and then the sales manager signs it
A. Right.
Q. Okay And then where does it go?
A. Then the salesperson takes it to Corey James at that time.
Q And Corey James then types up Exhibit Number -- the one that doesn't have that cut off.
A That is correct.
Q. CBM-000042.

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A. Yes, sir.
Q And should be exactly the same, except one's typed and one isn't.
A. Yes, sir.
Q Well, why do you do that?
MR. BLACK: Object to the form.
A. Why do you do the first one, the handwritten one?
BY MR. LEWIS:
Q No, why do you take one and get it all filled in in handwriting, and then take the time to type it -- type it and get it on a different -- the same form typed?
A. To make sure there's no mistakes.
Q. To make sure there's no mistakes?
A. Yes, sir.
Q There's more likely to be a mistake if you go from a handwritten one to a typed one.
MR BLACK: Object to the form.
A. These two have to match.
BY MR. LEWIS.
Q. Oh, they have to match I gotcha. And who determines they match?
A. The account -- I mean, the F and I office, Corey James.

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Q. Now, who is -- the bottom signature, who is that?
MR. BLACK: There are a number of signatures. Which are you asking him about?
BY MR LEWIS:
Q. On 000042. Mine is cut off a little bit. What's the bottom signature, is that Corey James?
A. Are you talking about where it says, this agreement, the very last --
Q. Yeah.
A. That would -- it's cut off, but it looks like Corey.
Q. Okay And then it says, disclaimer of warranties, purchaser's signature. The purchaser's signature is not there, right? Am I right?
A. You're talking on new vehicle disclaimer warranties?
Q Yeah.
A They didn't buy a new vehicle.
Q So you have to sign either one of those?
A. Yes, sir
Q Okay. And Corey James is the officer of the company that signed this.
A. Yes, sir
Q. And he is also the -- is that his signature

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on the 4019? Whose signature is that?
A. I haven't seen this signature in a long time, but I would assume it's Jeff Novak.
Q And what is he?
A. He was the used car manager.
Q So the used car manager agreed to it, and Corey James agreed to it on a different form
A Yes, sir.
Q. Once they – the used car manager agreed to it, it's over with then, isn't it? Does Corey James have the right then to not do it?
MR. BLACK: Object to the form
A. Corey does not have the right to stop the deal.
BY MR. LEWIS:
Q. So why – so he approved it, but he doesn't have the right to not approve it?
A. He would not sign it if it did not match up.
Q. But all he would be able to do is match it up, because once it's signed, as shown on 4019, then you have to sell the car.
MR. BLACK: Object to the form.
A. Sold – 4019, we agreed to sell the car for this amount.

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BY MR LEWIS:
Q. Right. And that's it.
A. The manager.
Q Right.
A. Corey would have the right, if there was something that did not add up correctly, to go back to Jeff and say, there's something wrong here, I'm not going to sign it until you get it straightened out.
Q And Jeff would have to go straighten it out
A. Yes, sir.
Q And that could even mean having – making them pay more money?
MR. BLACK Object to the form.
A. Not above what they originally agreed to.
BY MR LEWIS:
Q. Okay. Now, this arbitration agreement says – has some provision in there about small claims court. Do you understand that, or do you know anything about that?
A. I don't know anything about the small claims court.
Q. You what?
A. I don't know anything about the small

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claims court part of it.
Q. Does – do you know if that's something they explain to people, or do you know? You don't know?
A. I don't know.
Q. Okay. We've got the packet that we showed before you, Exhibit Number 3 Okay. Our client said there were more documents than this, than shown, some other documents than shown in this packet. Do you know what they could have been?
MR. BLACK: Objection. Mischaracterizes the testimony.
BY MR. LEWIS:
Q. Well, could there have been more documents given to the Watts than are in this packet?
MR. BLACK: Okay. Form, speculation.
A. I mean, other than owner's manuals?
BY MR. LEWIS:
Q. Yeah.
A. There could be owner's manuals.
Q. Anything else?
A There should be other – no more legal documents, no.
Q. You know anything about what's been called the Dealer Act, the act that allows people to bring

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suits against dealers for not doing – for fraud and so forth?
A. No, sir.
Q. Have you ever read anything on it?
A. No, sir.
Q. Now, I want to ask you one more little set of questions. And what I want to know is you mentioned to me that there may be a training or – and the training might lead us to what is taught to F and I people. Where would we go to find that?
MR. BLACK: Object to the form.
A. To find the training schedule?
BY MR. LEWIS:
Q. To find out what – how they train people What is –
A. Richard O'Connor.
Q. And he would have the training?
A. Yes, sir.
Q. And he's up in the offices in –
A. Charlotte.
Q. – Charlotte And what – and it's called Sonic, the Sonic offices?
A. It's Sonic Automotive
Q. Okay. In Charlotte?
A. Yes, sir.

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MR. LEWIS: Excuse me just a minute
MR. BLACK: Break?
MR. LEWIS: I hope that we can leave you.
(A recess transpired.)
MR. LEWIS: Thank you, Mr Bishop.
THE WITNESS: Thank you.
EXAMINATION
BY MR. BLACK:
Q. Mr. Bishop, my name is Dennis Black. I'm from the law firm called Williams and Connolly. You understand I represent Century BMW?
A. Yes, sir.
Q. Mr Lewis asked you a bunch of questions about what he termed "the packet" this morning, and I think it's marked in front of you as Exhibit 3 Do you recall those questions?
A Yes, sir
Q. Are there a number of documents in what he called the packet that are not shown to the customer at the time of the deal?
A. There's quite a few in there that wouldn't be shown to the customer
Q. So what's – what you've got in front of you as Exhibit 3 is not a stack of documents all of which are given to the customer in the F and I

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office.
A. That's correct.
Q. Let's go through and give some examples of that. Would the – and you skipped over – when you were asked about documents that were explained to the customer, you skipped over a number of documents in the deal jacket, right?
A. Correct. Those would be documents the customer wouldn't see.
Q Okay. Let's look at CBM – well, let me use his numbers since he did. If you turn to Document Number 4000, the vehicle history report
A. That wouldn't be to the customer
Q. And 4001, where you were paying off the lien on the trade-in?
A. That wouldn't be to the customer.
Q If you go to the 4003.
A. No
Q And by no, you mean that doesn't go to the customer?
A. Would not go to the customer
Q. 4004?
A It's a copy of 4003, and 4005 and 4006 is all copies of the same document. They would not go to the customer

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Q. How about 4009?
A. 4009 would go to the customer.
Q 4012?
A. Would not.
Q 4013?
A. Would not.
Q. 4014 came from the customer?
A. Yes, sir.
Q Same for 4015?
A. Yes, sir.
Q How about 4016?
A. That would not go to the customer
Q 4017?
A. Would not.
Q. 4018?
A. No, sir.
Q. 4020?
A. No, sir.
Q. 21?
A No, sir.
Q. How about 22, does that go to the customer, 4022?
A Yes They paid cash for it; they would get this title.
Q. Okay 4026?

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A. No, sir.
Q. 4027?
A. Would not go.
Q. 4028?
A. Would not go.
Q. 4029?
A. No.
Q 4030?
A. No.
Q. 4031?
A. No, sir.
Q. 4032?
A No, sir
Q 4033?
A. No, sir.
Q. 4034?
A. No, sir
Q. 4035?
A. No, sir
Q 4038 is a fax from the customer sometime after the transaction?
A Yes, sir.
Q. So that wouldn't have been explained to the customer during the transaction.
A. No, sir.

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Q. And the checklist at 4039, that doesn't go to the customer, does it?
A. No, sir.
Q. Did Century BMW have an official policy of whether you would sell a vehicle to a customer who refused to sign the arbitration agreement?
MR. LEWIS: Object to the form.
A. If a customer objected to signing the arbitration form, we would still sell them the car.
BY MR BLACK.
Q. You – you testified that you – that the F and I managers were not trained to volunteer to the customer that you don't have to sign this arbitration agreement. Do you recall that?
A. Correct. The F and I manager was not obligated to explain that they did not have to sign the arbitration agreement.
Q Were they trained to tell the customer, you are required to sign this arbitration agreement?
A. No, sir.
Q. If the customer asked, am I required to sign this arbitration agreement as a condition of buying the car, what was Century BMW's policy for –
MR LEWIS: I object to the form.
A. The customer –

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BY MR. BLACK:
Q. Let me ask the question. What was Century BMW's policy about whether they would sell a car to someone who objected to signing the arbitration agreement?
A. We would still sell the car.
Q. You testified that you could only remember the name of one person who had refused to sign the arbitration agreement and, nevertheless, bought a car Are you aware that there are other customers whose names you don't remember who similarly refused to sign the arbitration agreement and you, nevertheless, sold them the car?
A. Yes
MR LEWIS: Object to the form.
BY MR. BLACK:
Q And are there other customers other than the one person whose name you remembered who refused to sign the arbitration agreement and –
MR. LEWIS: Object to the form.
BY MR BLACK
Q. Let me finish my question Are there people other than the person whose name you mentioned that you are aware of who refused to sign the arbitration agreement and, nevertheless, were

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sold a car by Century BMW?
MR. LEWIS: Object to the form.
BY MR. BLACK:
Q. You can answer.
A. Yes, sir.
Q. You mentioned earlier that you're only aware of one arbitration that's been filed since you've been general manager?
A. Yes, sir
Q. How many lawsuits are you aware of that have been filed against Century BMW since you've been general manager?
A. Actually, there was two.
Q. And does that include this one?
A. Yes, sir
Q. So this one and one other.
A. Yes, sir.
Q. And was the one other the one that went to arbitration?
A. The other one, I cannot recall. I did not go to court. I believe it was dismissed between the two lawyers.
Q. Okay. So there's the Turner case that went to arbitration. There's the one other one.
A. Right.

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Q. And then there's this lawsuit.
A. Yes.
Q. And that's the only litigation you're aware of?
A. That's the only litigation I've been involved in since 2002. And before that, I was not involved in any.
MR. BLACK: Nothing further.
EXAMINATION
BY MR. LEWIS:
Q. You mentioned you remember some other customers that you couldn't remember on the arbitration agreement?
A. I remember other cus- -- customers not signing. I do not remember their names.
Q. Do you remember whether it was one, two, three, four?
A. Exact number, I couldn't tell you, sir.
Q. You couldn't tell me anything about it. You just remembered somewhere –
A. Yes, sir.
Q. – just in your head somewhere.
A. Yes, sir.
MR LEWIS. Nothing further.
(The deposition was concluded at 11 58 p.m.)

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SIGNATURE OF DEPONENT

I, the undersigned, JOHN ROBERT BISHOP, hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any:

PAGE	LINE	CHANGE	REASON

_____

JOHN ROBERT BISHOP DATE

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CERTIFICATE OF REPORTER

I, Kathy P. Taylor, Registered Professional Reporter and Notary Public for the State of South Carolina at large, do hereby certify that the foregoing transcript is a true, accurate and complete record.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof

WITNESS MY HAND, I have hereunto affixed my official seal this 1st day of February, 2008, at Greenville County, South Carolina.

_____

KATHY P. TAYLOR
REGISTERED PROFESSIONAL REPORTER
MY COMMISSION EXPIRES
JUNE 13, 2017

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(No information was requested.)

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STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS

COUNTY OF AIKEN
HERRON, et al.,

Case No.
2006-CP-02-1230

Plaintiffs,

vs.

DICK DYER & ASSOCIATES, INC., et al,

Defendants.

DEPOSITION OF: CHRISTINE WATTS

DATE: January 29, 2008

TIME: 5:15 p.m.

LOCATION: LEATHERWOOD WALKER TODD & MANN, P.C.
300 East McBee Avenue, Suite 500
Greenville, South Carolina

TAKEN BY: Counsel for Defendant,
CENTURY BMW

REPORTED BY: KATHY P. TAYLOR,
Registered Professional Reporter

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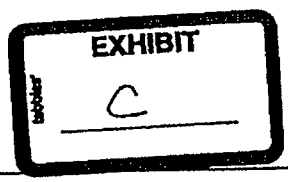
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ALSO PRESENT.
MELANIE BLEASE, Paralegal
ALISON DANNERT, Paralegal

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STIPULATION

It is stipulated by and between Counsel that this deposition is being taken in accordance with the South Carolina Rules of Civil Procedure, Rule 30; that all objections as to Notice of this deposition are hereby waived, that all objections except as to form are reserved until the time of trial, and that the deponent does not waive reading and signing of this deposition.

* * * * * * * * * * *

CHRISTINE WATTS,

being first duly sworn, testified as follows:

EXAMINATION

BY MR. BLACK.

Q. Good evening, Ms. Watts. Could you state your name and your address for the record, please.

A. Christine Watts. And my address is 3729 Harwick, H-A-R-W-I-C-K, Place, Charlotte, North Carolina 28211.

Q. And we haven't met before, but my name is Dennis Black. I'm an attorney from a law firm called Williams & Connolly. And you understand I represent Century BMW and some other car dealerships in this dispute?

A. Okay. Yes, I do.

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Q. Okay. And the other people sitting here also represent -- at least on this side of the table -- also represent Century BMW until you get to the guy at the end, who represents some other dealerships. And I take it you know your own counsel.

A. Yes, sir.

Q. (Pointing) And he represents some car dealerships, too.

A. Okay.

Q. So just so you know who everyone is.

Have you ever had your deposition taken before?

A. I have not.

Q. Okay. Let me give you a couple of ground rules. I'll be asking a bunch of questions. Hopefully you'll be answering them. Try to answer them aloud and with words.

A. Okay.

Q. Because the court reporter here is trying to take everything down, and she can't take down gestures and nods and shakes and shrugs. Is that acceptable?

A. Yes.

Q. And if you say -- if you nod or shake your

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head, one of us may say, is that a yes or is that a no

A. Okay

Q. We're not trying to be rude, we're just trying to keep a clear record.

(Ms. Chapman entered the deposition.)

BY MR. BLACK:

Q. The -- also try and avoid uh-huh and huh-uh, because they look garbled on the transcript.

A. Yes.

Q. If you could try and let me finish my questions before you jump in with your answers, that will help keep a clean record, also; and I'll try and give you the same courtesy of letting you finish your answers before I jump in with another question. Is that acceptable?

A. Yes.

Q. If I ask any garbled questions, as I'm prone to do from time to time, please, if you don't understand it, ask me to rephrase the question or tell me that you don't understand it. And the rules here in South Carolina require you to direct any requests for clarification to me and not to your own counsel. Is that acceptable?

A. Yes, I understand.

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Q. And the rules also require that you not talk with your counsel about the deposition or the case while we're going on with the deposition. Is that acceptable?

A. I understand.

Q. Okay. What, if anything, did you do to prepare for your deposition?

A. I had a meeting with my lawyers.

Q. Okay. And who was present for that meeting?

A. Melanie and Brady.

Q. Anyone else?

A. My father, Mike Watts.

Q. Was that Friday -- Sunday night?

A. Yes.

Q. And how long approximately did the meeting last?

A. Maybe an hour.

Q. The -- and then as you were driving home from the meeting, did you have a chance to have a further discussion with your father about the deposition?

A. We did not talk about that on the way home.

Q. Since you -- since Sunday night, have you talked to anyone else in preparation for your deposition?

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A. I talked to Melanie and Brady before I came today.

Q. Okay. Did you have a chance to talk to your father after he was finished with his deposition today?

A. Yes.

Q. And when was that?

A. Maybe lunchtime.

Q. Okay. And was it in person or on the phone?

A. It was just on the phone.

Q. Okay. And who called who?

A. I called my father to ask him how long it would take.

Q. All right. And what did he tell you?

A. Two hours.

Q. Okay. Hopefully, since we got some information from him this morning, we won't have to repeat it with you, and we'll be even quicker. Did he tell you anything about the questions that were asked at the deposition?

A. No, he did not.

Q. Aside from the length of the deposition, did you have any other discussions about the deposition with him?

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A. No.

Q. Other than Melanie and your father today, did you -- have you talked to anyone else in preparation for your deposition?

A. Just my boss, that I had to go to the deposition.

Q. Okay. Could you describe for us your educational background since high school?

A. I have a bachelor's and a master's degree in accounting.

Q. And what year did you get your bachelor's?

A. '03, 2003.

Q. And from what school?

A. College of Charleston.

Q. And from what school did you get your master's?

A. College of Charleston.

Q. And what year was that?

A. 2005.

Q. And you said that was in accounting?

A. Accounting.

Q. And any subspecialty or -- in accounting?

A. No.

Q. Since getting your master's in 2005, have

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you pursued any other studies?
A. Please rephrase
Q. Since -- have you done any further schooling since 2005, when you got your master's?
A. Only accounting-related
Q. So you're continuing to study accounting?
A. Yes, sir
Q. Okay. Are you going for a Ph.D. or --
A. No, I -- you have to do it for -- to get a CPA.
Q. Okay. And have you received -- do you have a CPA?
A. No
Q. What's the stages in getting a CPA?
A. I can sit for the CPA, but I have to have a certain number of hours before -- accounting experience before I can actually get my license.
Q. Okay. And how far along in that process are you?
A. Getting pretty close
Q. Okay. So have you scheduled to take the exam?
A. I have not. I filled out the application.
Q. The -- where have you -- did you work at all when you were at the College of Charleston?

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A. I did not work at College of Charleston
Q. Okay. And is that true through your master's degree?
A. Between my undergraduate and graduate, I had an internship with PriceWaterhouseCoopers
Q. And where was that?
A. In Spartanburg, South Carolina.
Q. And what was involved in the internship?
A. Audit work.
Q. So that would have been in 2003?
A. 2004
Q. And then while you were -- how long did it take to get a master's degree?
A. Just one year
Q. Okay. And were you working while you were studying for your master's?
A. I was not.
Q. Okay. The -- we learned from your father this morning that -- I'm sorry. I forget Melanie's last name -- you're Melanie's former roommate?
A. Yes. I am
Q. And what is Melanie's last name?
A. Blease
Q. What?
A. Blease

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Q. Blease. And when were you Melanie's roommate?
A. Undergraduate, 2002 and -3
Q. And not thereafter?
A. Not thereafter
Q. Okay. Have you remained friends with Melanie thereafter?
A. Yes, I have
Q. Up until today?
A. Yes.
Q. Since you got your -- what month did you get your master's in 2005?
A. August
Q. August. And since you got your master's, have you become employed?
A. Yes. I worked for PriceWaterhouseCoopers until June of this year
Q. June of last year?
A. This -- yeah, last year
Q. And so when did you start with PriceWaterhouseCoopers?
A. 2005
Q. Immediately upon graduating in August?
A. In -- September 1st.
Q. And what position did you take?

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A. Audit associate
Q. And what were your job responsibilities?
A. Handling client relationships, performing audits of all types of nature.
Q. Were you focused in any particular industry or business?
A. Manufacturing
Q. And were you an audit associate throughout your tenure at PriceWaterhouseCoopers?
A. I was
Q. Okay. And you -- you left in June of 2007?
A. Yes.
Q. And did you take another position in June of 2007?
A. I started July 1st with Dixon Hughes
Q. And what is Dixon Hughes?
A. It is a regional accounting firm.
Q. And is that in Charlotte, North Carolina?
A. Yes, sir
Q. And what position did you take in July of 2007 with Dixon Hughes?
A. Audit associate
Q. And do you focus on any type of business or industry?
A. Manufacturing and non-profit.

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Q And do you remain an audit associate today?
A I do
Q Does PriceWaterhouseCoopers have its employees sign arbitration agreements when they become employed?
A Not to my knowledge, no
Q Do you know if you signed an arbitration agreement with PriceWaterhouseCoopers?
A Not that I'm aware of, no
Q Same question for Dixon Hughes; do they have you sign an arbitration agreement?
A No
Q Your father told us this morning you were introduced to the lawyers that are now representing you through your friend, Melanie.
A That is correct.
Q Do you recall when you first talked to Melanie about this case?
A I do not remember
Q Do you know how long it was in advance of the case being filed?
A I do not know
Q In your discussions with Melanie prior to your retaining counsel, did the subject of your having signed an arbitration agreement with Century

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BMW come up?
A No
Q In your conversations with anyone other than counsel and their staff prior to your -- the lawsuit being filed did you discuss the fact that you had signed an arbitration agreement with Century BMW?
A No
Q How many vehicles have you been the primary driver of in your life?
A Four
Q And what was the first one?
A Ford Ranger
Q And when did you become the primary driver of that vehicle?
A When I was 15
Q So that would be what, approximately what year?
A '95
Q And did your family own that vehicle before you became the primary driver of it?
A Yes
Q Okay Were you present when the vehicle was purchased?
A No

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Q Prior to owning that -- driving that vehicle, had you ever been present when anyone purchased a car from a car dealership?
A No
Q After the Ford Ranger, what was the next vehicle you were the primary driver of?
A Toyota Celica
Q And how many years later was that?
A One year
Q And did your family own that car before you became the primary driver?
A No.
Q Was it purchased for you?
A Yes
Q Was it a new or used vehicle?
A Used.
Q Used. Who paid for it?
A My parents Mike and Phyllis Watts.
Q Were you involved in choosing it?
A Yes
Q Was it purchased at a car dealership?
A Yes.
Q Do you remember which one?
A No
Q Were you present when the car was

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purchased?
A No
Q Did your -- who was -- who was primarily involved in the back and forth with the dealership on the purchase?
A My father, Mike Watts
Q And did he negotiate the price of the vehicle?
A I have no idea
Q Okay So you weren't there at all
A No, sir
Q Okay What was the next vehicle that you became the --
A Ford Mustang
Q And when was that?
A A year after the Celica
Q So now you're 17?
A Uh-huh.
Q Okay And did you own that -- was that vehicle owned by your family prior to you becoming primary driver?
A No
Q What happened to the Celica?
A I just didn't like it.
Q Okay So it was -- so the Ford Mustang was

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purchased from a car dealership?
A. Yes.
Q. And were you present when it was purchased?
A. Yes
Q. And did you take part in any negotiations?
A. No
Q. Did your father?
A. Yes
Q. And did he -- were you present when he negotiated the price of the vehicle?
A. Yes.
Q. Okay. How long -- how long did that take, if you recall?
A. I don't remember.
Q. Were you a co-owner of any of the vehicles we've discussed so far --
A. No
Q. -- the Ranger, the Celica or the Mustang? So they were all in your father's name, and mother's, maybe?
A. Yes
Q. So I take it you didn't sign any paperwork associated with those vehicles?
A. No.
Q. How long did you -- were you the primary

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driver of the Mustang?
A. Three years
Q. And is that when you got the Montero?
A. Yes.
Q. The -- was the Montero purchased at a car dealership?
A. No
Q. Okay. Where was the Montero purchased from?
A. A family friend
Q. And who purchased it?
A. Mike Watts
Q. And what did you do with the Mustang?
A. Sold it.
Q. Just in a private sale?
A. Private sale
Q. And you were the primary driver of the Montero up until you got the Z-4?
A. Yes
Q. Aside from the transaction at Century BMW when you purchased the Z-4, had you ever signed an arbitration agreement before?
A. No
Q. Had you ever before been requested to sign an arbitration agreement and refused for whatever

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reason?
A. No.
Q. At the time you were in Century BMW buying the Z-4, did you have an understanding what arbitration is?
A. No
Q. So I take it at the time you didn't have a view whether it was a good thing or a bad thing
A. No
Q. No. I'm -- no, I'm wrong, or no you didn't have a view?
A. No, I didn't have a view of -- I didn't really know what it was, so no. I didn't have a view of it.
Q. Okay. Up until today have you ever participated in arbitration in any capacity, as a witness or a party or anything like that?
A. No.
Q. So I take it you've had no bad experiences with arbitration.
A. No
Q. As I understand it, the Z-4 was a graduation present of sorts for you.
A. Yes.
Q. And you were the person that primarily did

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the research in looking for a car before you purchased it; is that true?
A. That's correct.
Q. Can you describe for us what types of things you did -- how long did the process of looking for a car take from beginning to end?
A. Can you rephrase? Like truly looking, or just kind of researching?
Q. Well, when did you first start researching?
A. Two months beforehand
Q. And about six months before you had come into Century BMW and test driven a car?
A. Yes.
Q. Were you looking to buy a car at the time?
A. No, not really
Q. So was it more in the -- and I don't mean this disparagingly, but was it more in the nature of a joyride test drive than as part of a serious looking for a car?
A. Well, I knew I would eventually, once I graduated, so I guess it was a joyride
Q. Okay
A. Just kind of checking out things
Q. What type of car did you test drive?
A. 3 Series

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Q And you said you started researching a couple of months before the actual purchase What did you do to start researching?
A I looked at safety, insurance rates, what I think the taxes would be. That's all.
Q. Did you start looking at different types of models and makes of cars?
A I did
Q And in what way did you do that?
A Internet
Q And were there any particular sites you looked at at the -- on the Internet?
A Probably Kelley Blue Book Probably the individual car websites, like manufacturer websites type things
Q. Did you look at all at purchasing a car from a private individual as opposed to a car dealership?
A No
Q You knew from at least your own past experience that one option was you didn't have to go to a car dealership at all, you could just buy it from some individual that was looking to sell their car; is that --
A Yes

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Q How much before you purchased the Z-4 did you actually go into a car dealership to look at cars for the first time during this particular search?
A Maybe a month or two Maybe a month or two
Q. And do you recall how many different car dealerships you visited in the month or two prior to coming into Century BMW?
A Two
Q And what were they?
A Ford in Greenville I don't know --
Q Is that Fairway Ford?
A You might be correct.
Q Over on Laurens Road?
A Yes sir
Q. Okay And did you test drive a Mustang there?
A Yes
Q And was that a new Mustang?
A Yes it was
Q And what other dealership did you go into?
A Century BMW
Q So only one dealership other than Century BMW?

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A Yes
Q Did you visit a Ford dealership in Greenwood?
A Greenwood? Not that I remember
Q. Were you aware of your father visiting another Ford dealership about buying a -- possibly buying a Mustang for you?
A I don't remember
Q. Had you -- prior to coming into the Century BMW, had you talked to any other car dealerships by phone or e-mailed back and forth with them or anything?
A No, I had not.
Q Putting aside the test drive of whatever -- do you remember what car you test drove six months before?
A 3 Series.
Q Oh, that's right. I already asked you that. How long before you actually purchased the car at Century BMW did you come into the dealership during your search for a vehicle?
A Can you please rephrase that question?
Q Yes Your father said that you -- your first visit to Century BMW in connection with your search was not the day you purchased the vehicle, is

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that right?
A That is correct.
Q. Okay How many days or weeks before you actually purchased the vehicle did you first come into Century BMW in connection with this search?
A Can I just -- are you saying when I went and test drove the one that I bought, how long before I went in and purchased?
Q. Yes
A Three or four days.
Q And on your first visit to the dealership did you go alone or were you accompanied by anyone?
A My father was with me, Mike Watts
Q And anyone else?
A No
Q And when you got to the dealership, did you know what car you wanted -- were interested in when you first got there, or did you look around and compare the various vehicles?
A When I test drove or when I bought?
Q When you came in three or four days before you bought.
A I was just looking around
Q Okay And did you and your father look around on your own, or were you accompanied by

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anyone from the dealership, or a little of both?
A. I don't -- I really don't remember
Q. Okay. Do you remember at all having any interactions with a salesperson that day?
A. No. I don't remember
Q. Okay. Did you -- have you heard of a woman called Elizabeth Courtney?
A. Yes
Q. And who is Elizabeth Courtney?
A. She's the one we actually -- the day we purchased it, we talked to.
Q. Okay. Do you recall whether you had any conversations with her on the -- when you visited three or four days before you purchased it?
A. I think we did, yes
Q. Okay. And what, if anything, do you recall about your conversations with her three or four days before you purchased the car?
A. I don't remember
Q. Who primarily interacted with her in that visit, was it you or your father?
A. My father
Q. And did you overhear whatever they were saying, or were you off looking at cars while they were talking?

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A. I was looking at cars
Q. Did you test drive one or more vehicles during that visit?
A. I test drove the vehicle I bought
Q. Okay. So -- and no other?
A. No other
Q. When you test drove the vehicle, was anyone with you in the car?
A. My father
Q. Was the salesperson in the car?
A. It's a two-seater, so no
Q. Did your father test drive the car?
A. I don't remember
Q. Do you recall one way or the other whether there was any pricing information about the vehicle on the vehicle?
A. Yes
Q. And what do you recall about that?
A. I remember it was around 31 -- about 32,000
Q. And how was that displayed? Was that displayed somewhere on or in the vehicle?
A. It was 34. Sorry. Yes, it had a big sticker
Q. Okay. And your recollection is the number

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34,000-something was on there?
A. Something like that.
Q. Was it also written in the windshield or anything like that?
A. Not that I remember
Q. While you were at the dealership that day, did you have any discussions with Ms. Courtney or any other Century BMW employee about how much you could buy the vehicle for?
A. No. That was later on the telephone.
Q. Okay. Did you understand when you were in the dealership that the price was negotiable?
A. Yes
Q. So you knew whatever that 34 figure was was not a take-it-or-leave-it number?
A. Yes.
Q. Do you recall any discussions you had with anyone from Century BMW during that visit that day?
A. No, I do not
Q. Okay. Do you know whether your father had any such discussions about pricing that day?
A. I do not know
Q. And you left the dealership that day without purchasing the car, right?
A. That is correct.

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Q. Why?
A. We wanted to -- I needed to look at my budget and talk to our -- the finance people that we work with and see what rate I could get and how much I could get from them for the loan.
Q. Were you aware that Century BMW would normally offer you financing for a purchase of a vehicle there?
A. Yes.
Q. But you knew you didn't have to take Century BMW's financing if you didn't want to, is that fair?
A. That is correct.
Q. So you understood it wasn't a requirement buying a vehicle at Century BMW that you enter into a financing agreement with them.
A. That is correct.
Q. Did you ever ask at any time anyone from Century BMW whether they could give you a better rate than you were getting from your credit union?
A. No.
Q. You said you -- did you always intend to finance with the credit union from the moment you got to the dealership?
A. That is correct.

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Q Did you personally have any discussions with the credit union about the terms of financing or did your father do that?
A That would be my father
Q And was that done by phone?
A That is correct.
Q Were you present?
A No I was not.
Q Did you sign any paperwork with the credit union before coming back to Century BMW?
A I did not. No
Q. Do you know if your father did?
A I have no idea
Q Did you visit the credit union in person before coming back to Century BMW?
A No, I did not.
Q Do you know if your father did?
A I have no idea
Q Okay Before you came back to Century BMW, had you already agreed on a bottom-line price for the vehicle with Century BMW?
A Yes
Q And how did that occur?
A Via telephone
Q Okay And who was it that dealt with

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Century BMW by telephone?
A My father, Mike Watts
Q And who – who initiated the telephone calls; did your father call them first?
A That is correct
Q And had you had a – prior to your father calling Century BMW had you discussed with your father what your goal was in terms of a price for the vehicle?
A Yes
Q And do you recall what your goal was?
A 31,000
Q 31,000?
A That's correct.
Q And was that after all taxes and whatever else, or was it –
A That's correct.
Q. Had you discussed with your father what your worst-case scenario was so far as the cost of the vehicle?
A Yes, I did
Q And was that different than what your goal was?
A That is correct
Q Okay And what was – do you recall what

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your bottom-line break point was?
A. 32,000, and it had to include the maintenance warranty
Q. Did you know one way or the other whether the vehicle was still covered by the BMW warranty that covers a new car?
A I do not remember
Q The car was a 2004?
A That is correct.
Q And you were buying it in 2005, is that right?
A That's correct.
Q The – were you present when your father was having telephone calls with someone at Century BMW to discuss pricing?
A Yes, I was.
Q Do you – was there one call or a number of calls?
A A number of calls.
Q. Do you recall how many approximately?
A At least two.
Q Do you know – do you know one way or the other who he was talking to?
A Elizabeth Courtney
Q And do you know who made the first offer?

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A My father
Q And do you remember what it was?
A No, I do not.
Q Do you remember what the dealership s response was?
A No I do not.
Q Do you remember anything other than what the final agreed figure was?
A No, that's all I remember
Q Okay And what was the final agreed figure?
A 32,000
Q. And do you recall what day that was that – was it the day after you were in the dealership or the day before you came back to the dealership, or can you place in time where it was?
A I don't remember I know that it was over a weekend, and the credit union was closed, like a Sunday So there was some lapse of time I don t remember exactly
Q And after your father reached an agreement on the price with Ms Courtney – do you know if he talked to anyone else in the process?
A On the telephone? Not that – I do not know

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Q After he agreed upon the price, did you then return to Century BMW in person?
A That's correct.
Q And did you know if anyone visited the credit union in between those two events?
A I do not know
Q Okay Did you bring any paperwork to the credit union from Century BMW?
A I do not know
Q And what day of the week did you purchase the vehicle, do you recall?
A I do not know
Q When you went back to Century BMW did you go back alone or with anyone else?
A With my father and mother
Q Okay
A Phyllis and Mike Watts
Q Okay And your mother is Phyllis Watts?
A That's correct.
Q So this time, all three of you were present?
A That's correct.
Q And did you all three pretty much stay together during the time you were there?
A No My mother looked at cars

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Q Okay So your -- you and your father dealt with the transaction and your mother --
A That's correct
Q -- went to see if you could purchase yet another vehicle?
A That is correct.
Q When you -- do you remember who you -- what Century BMW employee you first dealt with on your return visit to the dealership?
A Elizabeth Courtney
Q Okay And when you came in, did she come and greet you?
A That's correct.
Q And did y'all have a discussion with Ms Courtney?
A That's correct
Q And what do you recall about that?
A We briefly discussed how excited I was about the car, and that was about -- finished looking at seeing the price, and that was about it
Q Did -- do you recall whether Ms Courtney had you sign any document or documents?
A We may have signed the price with her, and then we ended up talking to a different guy for the rest of it

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Q Do you recall that there was a handwritten document that you -- a pre-printed, with numbers written in by hand, that you signed?
A Pre-printed?
Q A pre-printed buyer's order, but whereas the final contract would have all the numbers typewritten, this was a handwritten?
A Can you tell me what -- did it say anything particular other than the price?
MR BLACK Can you put in front of her the Exhibit 1 that was marked this morning?
A (Viewing document) I don't remember signing this
BY MR BLACK
Q Okay Exhibit 1 is a collection of documents I'll represent to you it's the dealership's file on your transaction.
A Okay
Q If you turn to the page -- you see there are little numbers that have been printed in the bottom right-hand corner If you could turn to Page CBM-0000025
A 00, what did you say?
Q 25
MR THOMAS Have you got an extra copy?

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MR BLACK Yeah. I'm sure the answer is yes I have one more
MR THOMAS That's for my illustrious co-counsel there Thank you
A Retail Buyer's Order?
BY MR BLACK
Q Yes
A Okay
Q And you see that the information in all the boxes has been filled out by hand on that form.
A I see that, yes
Q And it totals out to the price you testified before about 32,000?
A Yes.
Q And do you know if -- who -- is that your signature at the bottom of the page where it says, co-buyer?
A Yes
Q And do you recall who gave you this document to sign?
A I do not remember
Q Did -- was there any further discussion with Ms Courtney about the terms of the sale any terms of the sale?
A Not that I remember

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Q Okay And she then introduced you to another person at the dealership?
A That is correct.
Q And do you recall what his name was?
A Corey, maybe I know he's the finance -- he was the finance guy
Q And Ms -- Ms. Courtney, was she always professional in her dealings with you?
A Yes she was
Q Always nice?
A Very much so.
Q Didn't put any undue pressure on you?
A No.
Q The same for Corey?
A He was -- what do you mean?
Q Did he -- was he a nice person to you, behaved professionally?
A He did.
Q Okay Did he -- didn't put any undue pressure on you?
A About the warranty a little bit, yes
Q Okay So he tried to sell you a warranty?
A That's correct.
Q Okay We'll get to that. The -- and what did you understand Corey's position was at the

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dealership?
A I didn't understand his position
Q Okay Where did you meet with Corey?
A In his office
Q And was that in a little cubicle-like office off the dealer showroom?
A That's correct.
Q And who was present?
A Him, me, and my father
Q And as between you and your father, who did most of the talking with Corey?
A My father
Q Okay Did you do any talking?
A No
Q The -- I think you told us Corey tried to sell you a warranty
A That's correct.
Q And did he also try to sell you a number of other products?
A Yes that's correct.
Q And let me ask you to turn to Page CBM five zeros, and then a 2, so the second page of the document. Do you see that's a document entitled Century BMW Menu of Investment Enhancements?
A Uh-huh

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Q Is that a yes?
A That's -- yes
Q And your father's signature appears at the bottom of that page in the right?
A That's correct.
Q And do you recall Corey going through this menu with you, trying to sell you the various products listed?
A Yes
Q And how long did that process take, if you recall?
A Maybe 30 minutes.
Q Okay. And that's 30 minutes of him trying to sell you products as opposed to 30 minutes being in the office altogether?
A I think so
Q Okay
A Yes
Q And were you eager to get out of the office?
A Yes.
Q You wanted to go drive your car?
A That's correct.
Q The -- notwithstanding whatever aggressive sales techniques Corey used, you declined to buy any

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of these agreements; is that fair?
A That is not correct. We did buy one of the maintenance agreements.
Q Did you buy it while you were buying the car?
A Yes.
Q Okay So if your father testified that you didn't buy it until the car was approaching 50,000 miles, would he be incorrect?
A No, that was correct. It was included -- I'm sorry -- in the initial -- we upgraded it after 50,000 miles
Q Okay Do you remember when that was?
A April, May of this year
Q Okay So about eight months after you sued the dealership?
A That's correct
Q And you bought it --
A I guess
Q And you bought it from the dealership?
A That's correct.
Q And the warranty you're referring to if you turn to the next page the third page of the document, do you see that it indicates that it's still under the factory warranty?

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A. Yes.
Q. So it was when that -- when the factory warranty was about to expire is when you, what you said, upgraded to the extended service plan
A. That's correct.
Q. Okay. But at the time you were in the dealership after hearing the 30-minute pitch from Corey you declined to purchase any of the things he tried to sell you is that right?
A. That's correct.
Q. So you knew that it wasn't a requirement of buying the vehicle at Century BMW that you enter into any of these agreements?
A. That's correct.
Q. Okay. And none of them were offered on a take-it-or-leave-it basis, that you can't get the car unless you get this
A. That's correct.
Q. Once Corey got done trying to sell you investment enhancements, what was the next thing that happened? Was that the first thing you did when you came back to the -- his office?
A. He did that while we were signing our papers.
Q. Okay. So he did what while you were

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signing your papers?
A. Was selling us the warranties while we were signing all our documents
Q. Okay. How many documents do you recall signing?
A. I have no idea.
Q. More than 30?
A. I have -- I do not remember
Q. 20?
A. I have no idea.
Q. How long did it take to sign -- sign your names as many times as you signed it?
A. Me? Probably ten minutes
Q. Ten minutes so you were --
A. Ten, 15 minutes
Q. So it's your testimony for ten or 15 minutes you were signing your name over and over again to documents?
A. That's correct.
Q. And were you reading the documents as you signed them?
A. No
Q. How long does it take you to sign your name?
A. Maybe half a minute

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Q. It takes you 30 seconds to sign your name?
A. Sometimes
Q. So if you spent ten minutes signing your name and it took you 30 seconds a time, you must have signed your name about 20 times
A. That may be correct.
Q. What?
A. That could be correct.
Q. Okay. And if it was 15 minutes, then it could be about -- it could be, if it took you 30 seconds a time, 30 times you signed your name.
A. That could be correct
Q. Okay. Did you -- I forget what you answered. Did you review the documents you were being asked to sign?
A. Nothing but the price.
Q. Okay. Did Mr -- did Corey do anything to prevent you from reviewing the documents?
A. No.
MR. BLACK. I'm going to take a break.
THE WITNESS. Okay
(A recess transpired.)
BY MR. BLACK.
Q. Ms. Watts, could you get Exhibit 1 back in front of you. And could I ask you to thumb through

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the entire exhibit and identify for me each of the pages in the exhibit in which your signature appears?
A. Would you like me to do it along and along, or --
Q. Yeah. How about, what's the first page on which your signature appears?
A. Number 1
Q. Okay. What's the next page on which your signature appears?
A. 5
Q. Okay. What's the next page on which your signature appears?
A. 14
Q. Okay. We're up to three. What's the next page on which your signature appears?
A. Technically, 21
Q. 21 is --
A. That's my driver's license.
Q. -- was your driver's license. You didn't sign that at the dealership, right?
A. No.
Q. Okay. So why don't we ignore 21. And what is the next page on which your signature appears?
A. 25

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Q We're up to four And what's the next page after 25 on which your signature appears?
A 31
Q And the next page? We're up to five
A 42
Q Up to six Is there any other page on which your signature appears?
A No
Q So if these are the documents from the transaction file, you signed your name six times?
A Some of them I signed more than once
Q Okay So six – how many – did you count how many you signed more than once?
A No I did not
Q Okay So you signed six separate documents
A Uh-huh.
Q Okay Did you object to signing any of the documents that you were given to sign while you were in the dealership?
A Of course not I just wanted the car, so –
Q Okay But you – whether or not you wanted the car, did you voice any objection to signing any of the documents you were given?

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A No
Q Okay Did you ask any questions about any of the documents you were given?
A No
Q Did you voice any complaints about any of the documents you were given?
A No
Q Am I correct that the – as you were thumbing through the documents you signed, one of them was an arbitration agreement?
A That's correct.
Q And am I correct that to your recollection, nothing at all was said orally about that arbitration agreement in the office with Corey?
A That is correct.
Q Okay So no one said to you that you were required to sign that document in order to get the vehicle is that fair to say?
A That's correct
MR BLACK That's all I have
MR THOMAS Can we take a quick break?
(A recess transpired.)
EXAMINATION
BY MR SPEARS
Q Christine, I'm Mike Spears. When is the first time you and I have met?
A Today, before I got here.
Q Okay Did we talk about the case at all that you recall?
A No
Q Okay Let me show you a copy of Plaintiff's (sic) Exhibit 1, which is allegedly the dealer's file with the documents from your transaction Do you remember which documents were gone over during your deposition by Mr Black when he asked you which documents you signed and what was told to you about it? I'm not asking you every document you signed. But he asked you which documents you thought you had to sign.
MR. BLACK Objection. I didn't ask that.
MR. SPEARS Okay
BY MR. SPEARS.
Q Which documents do you – you certainly signed the document of CBM-5, did you not?
A That is correct.
Q Okay As we sit here today do you know what it is?
A No
Q Do you – did you know what it was when you bought the car?

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A No
Q Okay Why did you sign it?
A I thought I had to to get the car
Q Okay Do you publish your personal information on Facebook on the internet?
A On Facebook? No, I do not.
Q Okay Are you in the habit of giving out personal information willie-nillie to anybody?
A No
Q Have you ever been cautioned by anyone not to do that for whatever reason?
A Yes, I have
Q Okay Look at CBM-1 Did you sign that?
A Yes
Q Okay Did you know what it was when you signed it?
A No
Q Okay Did you realize by signing CBM-1 that you were being given notice to tell you how they were going to use your non-public – personal information about you and that they could release it to market service providers amongst affiliates of BMW Century – and to other third parties we may share all private information about you as a consumer, customer or former customer with other

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non-affiliated parties as permitted by law Did you see that?
A. No, I did not. I did not read it
Q. Okay. Did you know you were doing that when you signed it?
A. No, I did not
Q. Okay Is it your habit to release personal information to anyone?
A. Not usually
Q. Okay Let's go to Number 14 Okay? Was CBM-14 passed to you?
A. I'm sure that it was in the packet.
Q. Okay Is that your signature?
A. That is correct.
Q. Did you know what you were signing?
A. No, I did not.
Q. Why did you sign it?
A. I thought I had to to buy the car
Q. Okay In what way was any implication given or any mood left with you that it was a document necessary for you to buy the car?
MR. BLACK. Object to the form of the question
BY MR. SPEARS:
Q. Go ahead.

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A. Can you please repeat it?
Q. Certainly Why did you think you had to sign any or all of these documents in order to get the car?
A. The way it was presented, I just thought I had to sign everything.
Q. Okay Now, were you in a small little cubicle with Corey and your dad and yourself?
A. That is correct.
Q. All right. Was there a machine in there that printed out these documents, and one by one they were passed across the table to you?
A. I just remember a big packet
Q. A big packet. Okay Were the documents removed from the packet by someone in the room, or were they just clipped together like we kind of have them clipped together right now?
A. That is how I remember it
Q. Okay What were you told about the packet? Was it passed to you?
A. It was passed to me
Q. Okay And were you merely to look at it, or were you told to do anything with the packet?
A. To basically sign. They had the little flags

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Q. All right That's my point. How did you know which pages to turn to to sign them?
A. Flags.
Q. I've got a little sticky, a little red sticky, on this particular page Were there little flags similar to this?
A. That is correct
Q. And were you told that you needed to sign on every page with the flags?
A. Yes
Q. Did you turn to that page and sign it?
A. That is correct.
Q. Did you read it before you signed it?
A. No
Q. Okay And did you know what any or all of those pages meant as you signed them?
A. No
Q. Okay Now, let me ask you if you would look with me at CBM-25. And CBM-25 has a purchase price of what written in hand?
A. 32,980.
Q. Did you agree to that? Is that what you -- was that your breaking -- your break point, 32,980?
A. I --
MR. BLACK. Object to the form of the

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question.
BY MR. SPEARS
Q. Go ahead.
A. I agreed to 32.
Q. Okay Is that number higher than 32?
A. That's correct.
Q. Did you in any way agree to pay that number?
A. No.
Q. Okay The next says Additional options. And it has $1604 50. Now, what can --
MR. BLACK. I apologize What page are you on?
MR. SPEARS CBM-25
BY MR. SPEARS
Q. $1,604 50 Does that appear, as you look at it to be a -- is there a minus in front of that?
A. No, there's not.
Q. Does that -- does that appear -- I mean, you're an accounting master's graduate Does that appear to be in addition to 32,980, without looking at the numbers below it?
A. It appears to be
MR. BLACK. Object to the form of the question.

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BY MR. SPEARS
Q. Okay. Does it in any way appear to be something that's going to be subtracted from that as an additional option?
A. No, it doesn't.
Q. Okay. Can you buy an option that you're familiar with from a car company where it will depreciate the cost of the car?
A. No, I do not.
Q. Okay. Yet does the total number show that 1604.50 has been subtracted from 32,980?
A. That's correct.
Q. Did you know what in the world that's for?
A. No. I do not.
Q. Did you know then?
A. No. I did not.
Q. Okay. Then sales tax is put down in the amount of what?
A. 300.
Q. And then a transfer of license is put down in the amount of what?
A. 25.
Q. And then pre-printed on here is a charge, and what's that for?
A. I have no idea.

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Q. What does it say?
MR. BLACK: Let me just object that this has extended beyond what the scope of what the Court allowed this deposition for. And it's your client, so you can ask whatever you want but the --
MR. SPEARS: It's for arbitration. I'm getting to --
MR. BLACK: I don't think it is for arbitration but go on.
BY MR. SPEARS
Q. What does it say it's for?
A. Recording and processing fees.
Q. Okay. And what did the total end up being?
A. 32,000.
Q. So somehow or another it ended up being exactly what your break point was?
A. That's correct.
Q. Okay. Did you sign that document?
A. Yes. I did.
Q. Okay. Did you think 1604 was being added to or subtracted from your car or did you have any idea about that number?
A. I didn't have --
MR. BLACK: Object to the form.
A. I didn't have any idea what that number was.

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BY MR. SPEARS:
Q. Okay. If I went through the rest of these documents where your sig-- signature appears on 31 and 42, did you have any idea what you were signing?
A. No, I did not.
Q. Okay. On Page 42, CBM-42, okay, what's the total price shown there?
A. 32,000.
Q. Okay. Did you know what this is?
A. No. I did not.
Q. Okay. As you read it today, what does it say?
A. Retail Buyer's Order.
Q. Okay. Do you see anywhere on here -- have you read it, by the way, word for word?
A. No, I have not.
Q. Okay. Have you -- do you see or did you see -- well, if you've never read it, you wouldn't know whether the Retail Buyer's Order references any other document or not, would you?
MR. THOMAS: Object to the form of the question.
A. I would not.
BY MR. SPEARS

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Q. Okay. Okay. Now, you were not required to sign it in any regard, but do you have any idea what CBM-45 concerns?
A. Just a checklist.
Q. Okay.
A. Everything we had to sign.
Q. It's a check --
MR. BLACK: Excuse me. Could you -- could you read back that answer?
THE COURT REPORTER: I missed that last part where he interrupted.
MR. BLACK: Did you get the checklist of --
THE COURT REPORTER: Just a checklist.
MR. BLACK: And did you get what she said after that?
THE COURT REPORTER: I did not. That's what I missed.
A. -- of everything we had to sign.
BY MR. SPEARS
Q. Okay. Now you didn't sign this checklist, did you?
A. No.
Q. Okay. And have you looked over it since the time that the lawsuit was brought?
A. Yes.

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Q Okay Are there things here that are not checked off with checks?
A Yes
Q Okay Did you finance the car through BMW?
A No.
Q Okay Okay Were you of the opinion you had to buy -- that you had to sign the documents where presented with the flags in order to get the car, or not?
MR BLACK Object to the form of the question
A Yes
BY MR SPEARS
Q Okay Any doubt in your mind about that?
MR BLACK Object to the form of the question
A No.
BY MR SPEARS
Q As to that being your opinion at the time?
A There's no doubt in my mind.
Q Okay And how far in your education process had you gone when you bought the car?
A I had not completed my master's degree
Q Okay
A I was within a month or two.

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Q So would it be fair to say you had a baccalaureate and were at the end of your master's?
A That's correct
Q Okay And you had been the primary driver of four previous vehicles?
A That's correct.
MR SPEARS Okay Give us a second.
(A discussion was had off the record and out of the hearing of the court reporter)
BY MR. SPEARS
Q Why did you need this car? What were you going to utilize it for?
A Work purposes
Q Okay Did you need a way to and from work?
A I did
Q Was this going to be your primary source of transportation?
A It was
Q Okay Did you need the car?
A I needed a car
MR SPEARS Okay That's all I have
EXAMINATION
BY MR BLACK:
Q You were driving a Mitsubishi Montero at the time?

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A That's correct.
Q It was in fine working order?
A Yes
Q So you could have continued to drive that car to work; would that be fair to say?
A Yes. It just had a lot of mileage
Q Okay You didn't need to buy a convertible BMW Z-4 luxury automobile to get to and from work, fair?
A Fair
Q Your job is an auditor?
A That's correct.
Q And as an auditor, you spend a lot of time reviewing documents, is that fair to say?
A Yes.
Q And you spend a lot of time with numbers is that fair to say?
A That's correct.
Q And it's important when you're reviewing documents as an auditor that you do so carefully, right?
A Yes
Q And you're trained in reviewing documents carefully as an auditor
A Yes.

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Q And at the time you purchased this automobile, you were a couple of months from a master's degree in accounting is that fair?
A That's correct.
Q So you have some facility with numbers; is that fair to say?
A Yes
Q Okay Look at CBM-000001 which was one of the documents that Mr Spears discussed with you. Do you recall that?
A I do
Q And he read you some language about sharing private information with other third-party affiliates and the like, do you recall that?
A Yes
Q Would you agree with me that as he read the language, there was nothing unclear about the language?
A That is correct.
Q You understood what the language meant when he read it to you?
A Yes.
Q And had you read it at the dealership on that day, you would have understood it then?
A Yes

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Q A number of the documents in Exhibit 1 were never shown to you while you were at Century BMW, true?
A That's correct.
Q For example, there are documents in the stack that include the commission vouchers for the salesperson?
A That's correct.
Q And so it would not be accurate to say that this stack of documents was presented to you in the F and I office at Century BMW, true?
A That is correct.
Q And, in fact, a stack of documents that actually contained your signature would be a stack six documents high, right?
A That is correct.
Q Let me ask you to turn to Page CBM-0025 Mr Spears called your attention to the 32,980 number at the top Do you see that?
A Yes
Q Can you subtract in your head for me 1604 50 from 32,980?
A Yes, I can.
Q Does it come to $31,375 50?
A Yes

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Q So in fact, the 1604 50 is being subtracted from the 32,980 on this form, fair?
A That's correct.
Q And the numbers then total out to add up to the bottom-line figure you agreed to, 32,000, right?
A That is correct
Q Let me ask you to turn to Page 45 Is it fair to say the checklist on Page 45 includes many more documents than you actually signed?
A That is correct.
MR. BLACK. I have nothing further
EXAMINATION
BY MR SPEARS
Q Okay Just to follow up on the questions that you were asked you in reply, on CBM-1, you were asked whether or not if you had read it at the time, you would be able to understand it?
A That's correct.
Q You indicated that you could if you had read it?
A Uh-huh
Q If you had read it and understood it and knew that you didn't have to sign it in order to get the car would you have signed it?
A No

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Q Okay. If you thought you had to get it – had to sign it in order to get the car, would you have signed it?
MR. BLACK. Object to the form of the question.
A Yes
BY MR SPEARS
Q. Okay Would the same be true of the other documents you signed?
A That is correct.
Q. Okay Now, out of the packet that was presented to you, were there documents in the packet that your father signed that you did not sign?
A That is correct
Q But they were in the packet, though?
A That's correct.
Q Okay Were there documents in the packet that you didn't have to sign at all?
A Yes
Q Okay So can we say that the packet itself merely had six documents in them, all requiring your signature, or did it have more than that?
A It had more than that.
MR SPEARS All right That's all I have
MR BLACK Do you have the transcript up

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on the page?
THE COURT REPORTER. Uh-huh. What are you looking for?
MR BLACK. Go on back a few questions
(Viewing transcript on the computer screen.)
MR. BLACK. Oh, I remember I have no questions Thank you. Can we stipulate that the exhibit is the same as this morning?
MR. THOMAS: Yes Not a problem.
(Defendant's Exhibit Number 1, Dealership transaction documents, was previously marked for identification)
(The deposition was concluded at 6 44 p m)

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SIGNATURE OF DEPONENT

I, the undersigned, CHRISTINE WATTS, hereby certify that I have read the foregoing deposition and find it to be a true and accurate transcription of my testimony, with the following corrections, if any

PAGE	LINE	CHANGE	REASON

_____

CHRISTINE WATTS DATE

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CERTIFICATE OF REPORTER

I Kathy P. Taylor Registered Professional Reporter and Notary Public for the State of South Carolina at large, do hereby certify that the foregoing transcript is a true, accurate and complete record

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

WITNESS MY HAND, I have hereunto affixed my official seal this 31st day of January, 2008, at Greenville County, South Carolina

_____

KATHY P TAYLOR
REGISTERED PROFESSIONAL REPORTER
MY COMMISSION EXPIRES
JUNE 13 2017

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(No information was requested.)

EXHIBITS

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Defendant's Exhibit Number 1 Dealership transaction documents.	65 11

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	CIVIL ACTION NO.: 06-CP-02-1230
HEATHER HERRON, ET. AL.	)	
Plaintiffs,	)	AFFIDAVIT OF CHRISTINE WATTS
vs.	)	
CARMAX AUTO SUPERSTORES, INC. ET. AL.	)	
Defendants.	)	

PERSONALLY APPEARED before me, Christine Watts, being duly sworn, deposes and states that:

1. I am a named Plaintiff in this action and am competent to testify to the matters stated herein.
2. On June 25, 2005 I purchased a 2004 BMW from Defendant Sonic Automotive, Inc. d/b/a Century BMW. A copy of my Retail Buyer's Order is attached as Exhibit A.
3. The 2004 BMW was purchased to be and is my primary source of transportation.
4. I was hastily given other paperwork which the dealership required me to sign. This paperwork included the "Arbitration Agreement" that is attached as Exhibit B.
5. The "Arbitration Agreement" was not discussed or explained to me and was given to me on a "take it or leave it" basis.
6. I did not participate in the drafting of the "Arbitration Agreement" and had no

EXHIBIT D

02028

voice in the formulation of its terms.

7. At the time of my purchase I did not understand the implications of arbitration or possess the experience necessary to make me aware of the implications of arbitration.

8. I did not have a lawyer present to provide me assistance in the execution of the paperwork required to purchase the 2004 BMW.

Further affiant sayeth not.

SWORN TO AND SUBSCRIBED BEFORE ME)
)
this ___ day of April 3, 2007)
)
Cynthia J Speed)
Notary Public for the State of South Carolina)
My Commission Expires: 12-5-15)

Christine Watts
Christine Watts

EXHIBIT A

02030

CENTURY BMW
CENTURY MINI

2730 LAURENS ROAD • GREENVILLE, SC 29607
PHONE (864) 234-6437
www.century-bmw.com • www.centurymini.com

RETAIL BUYER'S ORDER

Name: Michael M Watts or Christine M. Watts — Spouse
Street: 210 Providence Sq. — Phone: 864-213-8498
City: Greenville — State: SC — Zip: 29615 — County
Employer — Phone: 864-370-7356
E-mail Address

Date: 6-25-05 — Stock No.: 15514
Salesperson: Elizabeth Courtney

PURCHASE

☐ NEW ☐ DEMO
☐ PRE-OWNED ☐ FACTORY CAR

Year: 04 — Make: BMW — Body Type — Series: Z4
Cylinders — Serial No.: 4USBT33554LS50759 — COLOR: Exterior / Interior

OPTIONS:
☐ PREMIUM PACKAGE
☐ SPORTS PREMIUM PACKAGE
☐ SPORTS PACKAGE
☐ COLD WEATHER PACKAGE
☐ ACTIVITY PACKAGE
☐ CONVENIENCE PACKAGE
☐ MOON ROOF
☐ LEATHER UPHOLS.
☐ PREMIUM SOUND
☐ IN DASH CD
☐ CD CHANGER
☐ HEATED SEATS
☐ ON BOARD COMPUTER
☐ ALLOY WHEELS
☐ CRUISE CONTROL
ENGINE: ☐ ____
TRANSMISSION: ☐ AUTOMATIC ☐ MANUAL

Mileage: 15514

TRADE

Year — Make — Body Type — Series
Cylinders — Serial No. — COLOR: Exterior / Interior
Mileage — Options

BALANCE OWED TO: — Name & Address:
LIEN — Name & Address:
Phone — Contact
Phone — Contact
Account #
Effective Dates
Effective Dates
INSURANCE INFORMATION — Company Name
Policy # — Effective Dates
Agent — Phone
Driver's License #

Remarks

PRICE: (Including Theft Protection & Service Charges)	32980
Additional Options:	$1,604.50
TOTAL:	34,375.50
Allowance on Trade-In	
Cash Difference	
SC Sales Tax	300
Balance Owed on Trade-In	
Title and License ☐ New ☑ Xfer ☐ Trans	25
Recording & Processing Fees	$299.50
TOTAL:	32000
Service Agreement	
Insurance	
TOTAL:	
Cash on Delivery	
BALANCE DUE:	

READ CAREFULLY: Century BMW / Century Mini agrees to sell and the Buyer(s) agree to purchase the vehicle as above described at the price set forth. The Buyer shall remit full payment of the entire balance due on or before _____. This Buyer's Order constitutes the entire agreement between the parties and may not be changed except by an instrument in writing signed by the party to be charged.

CENTURY BMW CENTURY MINI

X _____ X _____
Buyer — Co-Buyer — Must be accepted by an Officer of the Company

☐ **USED CAR CONTRACTUAL DISCLOSURE STATEMENT:** - "The information you see on the window form (Buyer's Guide) for this vehicle is part of the contract. Information on the window form overrides any contrary provisions in the contract of sale."

Purchaser's Signature X _____

☐ **NEW VEHICLE DISCLAIMER OF WARRANTIES:** - I have read, understand and accept all provisions of the Manufacturer's Warranty Statement covering this new vehicle that I am purchasing. Furthermore, I understand that all warranties on this vehicle are those of the manufacturers. The seller, Century BMW / Century Mini, hereby expressly disclaims all warranties, either expressed or implied, including any implied warranty of merchantability or fitness for a particular purpose and Century BMW / Century Mini, neither assumes nor authorizes any person to assume for it any liability in connection with the sale of this vehicle. This disclaimer in no way affects the provisions of the manufacturer's warranties.

Purchaser's Signature X _____

This agreement between the undersigned buyer(s) and dealer is incorporated by reference into and is made a part of any separate retail installment or credit sale agreement between the undersigned buyer(s) and dealer ("Retail Financing Agreement"). Notwithstanding anything to the contrary in any other document, if there is a Retail Financing Agreement the undersigned buyer(s) understand and agree that the transaction evidenced by this agreement and the Retail Financing Agreement is contingent upon credit approval by, and assignment of the Retail Financing Agreement to, a third-party financial institution. If the Retail Financing Agreement is not accepted by a third-party financial institution, you must immediately return the vehicle referred to in this agreement, and the entire transaction evidenced by this agreement and the Retail Financing Agreement and this agreement shall be null and void.

Sold _____ (Buyer) Signed _____ (Dealer)

Signed _____ (Buyer)

02031

EXHIBIT B

02032

ARBITRATION AGREEMENT
(All States Except CA)

DATE: 6.25.05 VIN: 4US4T33554L582759

In this Arbitration Agreement ("Agreement"), "you" and "your" refers to the customer(s) who sign(s) below. "We", "us", and Dealer refer to the Dealer signing below, and includes the Dealer's employees, agents, and parent and affiliated companies (including, but not limited to, Cornerstone Acceptance Corporation) and their employees and agents. "Parties" refers to you and us. "Vehicle" refers to the automobile identified by the VIN set forth above. "Claim(s)" includes any and all disputes, claims or controversies between the Parties relating to this Vehicle or arising out of or relating to: (a) the application for and the terms of and enforceability of the sale, lease, or financing of the Vehicle, (b) the purchase or terms of any warranty, service agreement, maintenance plan, paint/undercarriage/interior protection product, anti-theft etching product and warranty, GAP protection, deficiency waiver addendum, or any or other product or insurance, (c) any claims of breach of contract, negligence, misrepresentation, conversion, fraud, or unfair and deceptive trade practices, (d) any claim of a violation of any state or federal statute or regulation, or (e) the Vehicle's condition, warranty, workmanship, servicing, maintenance or repair. All Claims must be brought within the time allowed by the applicable statute(s) of limitation. "Contract(s)" refers to any agreement(s) between you and us regarding the sale, lease, financing, service or maintenance of the Vehicle.

Upon the request of a Party, any and all Claim(s) shall be decided in binding arbitration before the American Arbitration Association (1-800-778-7879/www.adr.org) ("AAA"). The Parties may mutually agree to use another arbitration forum and/or qualified arbitrator. Unless mutually agreed otherwise between the Parties, any arbitration under this Agreement shall be conducted under the commercial arbitration rules of the AAA. To the extent that any Claim is deemed a "consumer dispute", the Parties agree that the fee schedule provided in the rules for consumer disputes of the AAA, if any, will apply. You can get a copy of the rules from the AAA. The arbitration hearing shall be conducted, at your option, in the federal district in which you reside or in which the Vehicle was purchased or leased.

The Parties waive the right to request arbitration for a Claim filed and maintained individually (as opposed to a class action) in your state's small claims court, if any. However, if such a Claim originally brought in small claims court is transferred or removed to a higher state or federal trial court, the Parties reserve their right to request arbitration under this Agreement.

The Parties agree that once one of the Parties has elected to arbitrate, binding arbitration is the exclusive method for resolving any and all Claims. By entering into this Agreement the Parties are waiving their right to a jury trial and their right to bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration. Until a Party entitled to do so requests arbitration under this Agreement, any party to this Agreement may proceed with all other rights and remedies they may have. Neither you nor we waive our right to request arbitration under this Agreement, even after all Parties have elected to litigate a Claim in court, in the event new Claims are asserted after the initial filing of such litigation in court.

The arbitrator shall be an attorney or retired judge. The arbitrator shall apply and be bound by governing local, state or federal law when making an award, and shall award only those damages or other relief allowed by such governing law. Issues regarding whether a matter is arbitrable shall be made by the arbitrator. The arbitrator shall prepare a written decision stating reasoned findings of fact and conclusions of law. A party may seek entry of a judgment on the award in any court of competent jurisdiction.

If you initiate a Claim for Arbitration under this Agreement, we agree to pay that portion of the AAA's initial filing fee which exceeds the lesser of the court filing fee for the state or federal court located in the jurisdiction in which you reside. If we initiate a Claim for arbitration we will pay the entire initial filing fee. We also agree to pay up to $1500 of the arbitrator's fees, unless applicable law or the rules of the AAA require otherwise. Unless applicable law or the rules of the AAA require otherwise, the Parties agree to share equally all other costs and fees, including the arbitrator's fees in excess of $1500. Notwithstanding any other provision of this Agreement, we will also pay any amount of fees or costs that a court or the arbitrator decides we must pay in accordance with applicable law for this Agreement to be enforceable. The arbitrator deciding the Claim(s) shall have the authority to award fees, costs, injunctive or equitable relief in accordance with this Agreement and applicable law. Unless otherwise ordered by the arbitrator in accordance with applicable law or provided otherwise by applicable law law, the Parties shall be responsible for the payment of their own attorney's(') fees.

This Agreement evidences a transaction involving interstate commerce. The Parties acknowledge and agree that the Federal Arbitration Act (9 U.S.C. § 1 et seq.) ("FAA") shall govern any arbitration under this Agreement. The arbitrator's decision shall be final and binding, except for any right of appeal provided by the FAA or the rules of the AAA.

If any part of this Agreement shall be deemed or found unenforceable for any reason, the remainder of the Agreement shall remain enforceable. In the event this Agreement is found void you and we waive our respective rights to a trial by jury, if such waiver is permitted by applicable law.

This Agreement shall survive the repayment of all amounts owed by you with respect to the Vehicle. This Agreement is incorporated into and made a part of all Contract(s) as defined in this Agreement. If there is a separate arbitration agreement in any other Contract, then to the extent this Agreement is inconsistent with any such arbitration agreement this Agreement shall supersede such other arbitration agreement with respect to Claims between you and us, unless otherwise provided by law.

- EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT.
- IF A DISPUTE IS ARBITRATED, YOU AND WE WILL EACH GIVE UP OUR RIGHT TO A TRIAL BY THE COURT OR BY A JURY.
- IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR A CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US, INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.
- THE INFORMATION YOU AND WE MAY OBTAIN IN DISCOVERY FROM EACH OTHER IN ARBITRATION IS GENERALLY MORE LIMITED THAN IN A LAWSUIT.
- OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.
- YOUR AND OUR RIGHTS TO APPEAL OR CHANGE AN ARBITRATION AWARD IN COURT ARE VERY LIMITED.

BY SIGNING BELOW, THE PARTIES ACKNOWLEDGE THAT THEY HAVE READ AND AGREE TO THE TERMS OF THIS ARBITRATION AGREEMENT

Customer: _____ Dealer: _____

Customer: _____ By _____

02033

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge

Circuit Court Case No. 2006-CP-02-1230

Heather Herron, Natalie Armstrong, Michael Ritz, Julie Freeman, Christine Watts, Alison Dannert, Michael Blease, Michael Watts, individually and for the benefit of all car buyers who paid "administrative fees" as described below to Defendants, ... **Respondents,**

v.

Century BMW d/b/a Sonic Automotive; Dick Dyer & Associates, Inc.; Galeana Chrysler Plymouth, Inc., a/k/a Galeana Chrysler Jeep, Inc.; J.L.H. Investments LP a/k/a Hendrick Honda; Overland, Inc., d/b/a Land Rover of Columbia; Taylor Toyota a/k/a Taylor Investments, and Toyota of Greenville, Inc.,. . . . . **Defendants,**

of whom Century BMW d/b/a Sonic Automotive is the . . . . . **Appellant**

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN DENYING THE APPELLANT'S MOTION TO COMPEL ARBITRATION WHEN THE COURT VIOLATED THE FEDERAL AND SOUTH CAROLINA POLICIES FAVORING ARBITRATION?

II. DID THE TRIAL COURT ERR IN DENYING THE APPELLANT'S MOTION TO COMPEL ARBITRATION WHEN THE COURT FOUND THE ARBITRATION AGREEMENT UNENFORCEABLE DESPITE THE WATTSES' UNDISPUTED OPPORTUNITY TO READ THE AGREEMENT?

III. DID THE TRIAL COURT ERR IN DENYING THE APPELLANT'S MOTION TO COMPEL ARBITRATION WHEN THE COURT FOUND THE UNDERLYING ARBITRATION AGREEMENT UNCONSCIONABLE?

IV. DID THE TRIAL COURT ERR IN DENYING THE APPELLANT'S MOTION TO COMPEL ARBITRATION WHEN IT FOUND MS. WATTS LACKED MEANINGFUL CHOICE IN AGREEING TO ARBITRATE?

V. DID THE TRIAL COURT ERR IN DENYING THE APPELLANT'S MOTION TO COMPEL ARBITRATION WHEN THE COURT FOUND THE UNDERLYING ARBITRATION AGREEMENT WAS A CONTRACT OF ADHESION?

VI. DID THE TRIAL COURT ERR IN DENYING THE APPELLANT'S MOTION TO COMPEL ARBITRATION WHEN THE COURT FOUND THE UNDERLYING ARBITRATION AGREEMENT CONTAINED OPPRESSIVE, ONE-SIDED TERMS THAT NO REASONABLE PERSON WOULD MAKE OR ACCEPT?

STATEMENT OF CASE

The Appellant, Century BMW a/k/a Sonic Automotive, the true name of which is Sonic Automotive 2752 Laurens Rd., Greenville, Inc. d/b/a Century BMW ("Century BMW"), appeals the Order of the Honorable Doyet A. Early, III, dated and received March 10, 2008, denying Century BMW's Motion to Compel Arbitration of Plaintiff Christine Watts's claims and to dismiss those claims. [R.pp. 1-13, Order; R.pp. 151-159, Motion.] Judge Early's Order, finding that Ms. Watts's arbitration agreement is unconscionable and unenforceable, relies on an erroneous reading of the facts and a misapplication of the law. [R.pp. 1-13; Order.] The record demonstrates that Ms. Watts did not lack a meaningful choice in signing the arbitration agreement. In addition, binding precedent establishes that the agreement does not contain any oppressive, one-sided terms.

FACTUAL BACKGROUND

In Spring 2005, Christine Watts[1] and her father, Michael Watts,[2] were looking for a car for Ms. Watts as a present for her upcoming graduation from the University of

[1] Ms. Watts is a twenty-six-year-old auditor with a bachelor's and master's degree in accounting. [R.p. 948, line 10-R.p. 953, line 2, Christine Watts Dep. pp. at 9:10-14:2.] At the time of the transaction, Ms. Watts had interned at the renowned accounting firm of PricewaterhouseCoopers—where she was set to work upon graduation—and was on the verge of completing her master's degree. [R.p. 950, line 4-R.p. 952, line 4, Christine Watts Dep. pp. 11:4-13:4.] As an auditor, Ms. Watts spends much of her time examining documents and working with numbers, and has been trained to review documents carefully. [R.p. 999, line 11-R.p. 1000, line 7, Christine Watts Dep. pp. 60:11-61:7.]

[2] Michael Watts is a fifty-two-year-old sales manager who has purchased a dozen cars from dealerships in his lifetime. [R.p. 895, line 1-R.p. 900, line 2, Michael Watts Dep. pp. 16:1-21:2.] From this experience, he knows that he can negotiate the price of any vehicle, that there are many places from which he can purchase a vehicle, that he does not have to buy additional product enhancements from the dealership, and that he can obtain financing from sources other than the dealership. [R.p. 899, 901, 903, 911, & 922, Michael Watts Dep. pp. 20, 22, 24, 32, 44.]

South Carolina with a master's degree in accounting. [R.p. 948, line 10–R.p. 953, line 2, Christine Watts Dep. pp. 9:10-14:2, 20:22-24.] Although Ms. Watts was driving a fully operable Mitsubishi Montero, she wanted a luxury convertible. [R.p. 999, lines 1-10, Christine Watts Dep. p. 60:1-10; R.p. 903, line 4, Michael Watts Dep. p. 24:4.] After visiting a number of other dealerships in their search for a car and engaging in price negotiations with them, they test drove a 2004 BMW Z4 ("Z4") convertible at Century BMW. [R.p. 904, line 17-R.p. 905, line 14, Michael Watts Dep. pp. 25:17–26:14.] They then left the dealership to deliberate on the Z4 purchase and check on financing with Mr. Watts's credit union. [R.p. 910, lines 20-34, Michael Watts Dep. p. 31:20-24.]

Mr. Watts obtained financing from his credit union. [R.p. 917, lines 6-18, Michael Watts Dep. p. 38:6-18.] Then, from the comfort of his home, he telephoned a Century BMW saleswoman to negotiate the price of the Z4; Ms. Watts did not participate in the negotiations. [R.p. 912, line 18-R.p. 915, line 7, Michael Watts Dep. pp. 33:18-36:7; R.p. 966, lines 23-24; R.p. 969, line 25-R.p. 970, line 2, Christine Watts Dep. pp. 27:23-24, 30:25-31:2.] Mr. Watts had multiple phone calls with the saleswoman, hoping to pay no more than a total of $32,000, which he had established as their bottom-line purchase price. [R.p. 915, line 10-R.p. 917, line 5, Michael Watts Dep. pp. 36:10-38:5; R.p. 969, line 25-R.p. 971, line 19, Christine Watts Dep. pp. 30:25-32:19.] During these negotiations, Mr. Watts knew he could walk away at any time, as he had done in the past, if he did not like any of the terms and conditions the dealership offered. [R.p. 915, lines 19-24, Michael Watts Dep. p. 36:19-24.] Ultimately, they agreed on his bottom-line price of $32,000, a figure that included any and all taxes, fees, and additional charges. [R.p. 972, lines 10-12, Christine Watts Dep. p. 33:10-12.]

A few days later, the Wattses returned to Century BMW to go through the paperwork with an F&I manager. [R.p. 919, lines 11-18, Michael Watts Dep. p. 40:11-18; R.p. 973, line 1-R.p. 977, line 13, Christine Watts Dep. pp. 34:1-38:13.] As with the price negotiations, Mr. Watts did all of the talking while Ms. Watts was a detached observer. [R.p. 978, lines 10-14, Christine Watts Dep. p. 39:10-14.]

The F&I manager did not overload the Wattses with a large number of documents to sign. Mr. Watts testified that he recalled signing five or six documents, while Ms Watts signed six documents. [R.p. 929, lines 18-24, Michael Watts Dep. p. 50:18-24; R.p. 985, lines 15-17, Christine Watts Dep. p. 46:15-17.] Moreover, only fourteen documents were handed to the Wattses during their meeting with the F&I manager. [R.p. 1072, lines 14-15; R.p. 1074, lines 18-20; R.p. 1075, lines 3-4; R.p. 1089, line 13-R.p. 1093, line 3, Bobby Bishop Dep. pp. 65:14-15, 67:18-20, 68:3-4, 82:13-86:3.] Mr. Watts confirmed that he did not receive a large stack of documents. [R.p. 930, lines 4-6, Michael Watts Dep. p. 51:4-6.]

The F&I manager did not place any duress on the Wattses. He did not prevent them from reading the documents and did not otherwise pressure them to sign anything. [R.p. 929, lines 13-R.p. 930, line 17, Michael Watts Dep. pp. 50:13-51:17; R.p. 983, lines 17-19, Christine Watts Dep. p. 44:17-19.] To the extent anyone was in a rush, it was the Wattses. Both explained they were "eager" to leave the dealership to drive the Z4 and tried to keep the meeting as short as possible. [R.p. 929, lines 1-14, R.p. 932, lines 13-18, Michael Watts Dep. pp. 50:1-14, 53:13-18; R.p. 979, lines 19-23, R.p. 985, lines 18-22, Christine Watts Dep. pp. 40:19-23, 46:18-22.] Ms. Watts was particularly removed from the process, admitting she was eager to leave and did not object to signing the documents

because she "just wanted the car." [R.p. 979, lines 19-21, R.p. 985, line 18-R.p. 986, line 7, Christine Watts Dep. pp. 40:19-21, 46:18-47:7.] She claims to have not read *any* of the six documents she signed and did not participate in the meeting with the F&I manager. [R.p. 982, lines 16-22, R.p. 983, lines 14-19, Christine Watts Dep. pp. 43:16-22, 44:14-19.]

As to the arbitration agreement, the Wattses agree that **no one ever stated that they were required to sign the arbitration agreement in order to purchase the car.** [R.p. 986, lines 12-19, Christine Watts Dep. p. 47:12-19; R.p. 933 lines 6-9, Michael Watts Dep. pp. 54:6-9.] This is consistent with Century BMW policy, **which is, and was, that the dealership will still sell a car to someone who refuses to sign the arbitration agreement.** [R.p. line 24-R.p. line 10; R.p. 1093, line 4-R.p. 1095, line 5, John Robert "Bobby" Bishop Dep. pp. 22:24-23:10, 86:4-88:5.] No one prevented the Wattses from reading the arbitration agreement; any rush to sign the paperwork was entirely self-imposed. [R.p. 929, lines 1-14; R.p. 932, line 13-R.p. 934. line 4, Michael Watts Dep. pp. 50:1-14, 53:13-55:4; R.p. 979, lines 19-23; R.p. 983, lines 17-19; R.p. 985, lines 18-22, Christine Watts Dep. pp. 40:19-23, 44:17-19, 46:18-22.] Nevertheless, in their haste to leave the dealership, they chose not to ask questions about the arbitration agreement, chose not object to it, and said that they did not read it. [R.p. 932, line 15-R.p. 934, line 4, Michael Watts Dep. pp. 53:15-55:4; R.p. 982, lines 16-22; R.p. 983, lines 14-19; R.p. 985, line 18-R.p. 986, line 11, Christine Watts Dep. pp. 43:16-22, 44:14-19, 46:18-47:11.]

Far from feeling pressure to sign whatever the dealership put in front of them, the Wattses expressly declined many agreements that the F&I Manager offered. They

refused to agree to or sign at least ten different agreements, including service contracts and dealership financing. [R.p. 920, line 3-R.p. 924, line 9, Michael Watts Dep. pp. 41:3-45:9; *See* R.p. 1108, Ex. 1 (Menu of Investment Enhancements).]

Both were capable of reading and understanding the arbitration agreement. Mr. Watts admits that the caption "**ARBITRATION AGREEMENT**" is easy to read, that the bullet points—highlighting certain provisions in all capital letters—are perfectly readable, and that the rest of the agreement is not difficult to read. [R.p. 930, line 14-R.p. 931, line 21, Michael Watts Dep. pp. 51:14-52:21.] Nevertheless, despite their admitted ability and opportunity to read the arbitration agreement, neither did so because they "wanted to get in and out as quickly as possible." [R.p. 929, lines 5-7, Michael Watts Dep. p. 50:5-7.]

The agreement provides that at the request of a party, "any and all Claim(s) shall be decided in binding arbitration before the American Arbitration Association." [R.p. 1100, Arbitration Agreement; R.p. 1120, Michael Watts Dep. Ex. 1.] The agreement defines the "Claim(s)" that the parties agreed to arbitrate as including:

> any and all disputes, claims or controversies between the Parties relating to the Vehicle or arising out of or relating to: (a) the application for and the terms of and enforceability of the sale, lease, or financing of the Vehicle, (b) the purchase or terms of any warranty, service agreement, maintenance plan, paint/undercarriage/interior protection product, anti-theft etching product and warranty, GAP protection, deficiency waiver addendum, or any or other product or insurance, (c) any claims of breach of contract, negligence, misrepresentation, conversion, fraud, or unfair and deceptive trade practices, (d) any claim of a violation of any state or federal statute or regulation, or (e) the Vehicle's condition, warranty, workmanship, servicing, maintenance or repair.

[R.p. 1100, id.; R.p. 1120, id.] The agreement provides that "once one of the Parties has elected to arbitrate, binding arbitration is the exclusive method for resolving any and all Claims. By entering into this agreement the Parties are waiving their right to a jury trial and their right to bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration." [R.p. 1100, id.; R.p. 1120, id.] The agreement also provides that the arbitrator shall award "those damages or other relief allowed by [the] governing law," including "fees, costs, injunctive or equitable relief in accordance with this Agreement and applicable law." [R.p. 1100, id.; R.p. 1120, id.] Additionally, under the agreement, Century BMW must pay for nearly all arbitration costs, the customer can choose between optional arbitration locations, and the customer can avoid arbitration entirely by bringing an action in small claims court. [R.p. 1100, id.; R.p. 1120, id.]

PROCEDURAL BACKGROUND

On October 31, 2006, Ms. Watts, along with other plaintiffs, brought this lawsuit as a representative action against hundreds of South Carolina car dealerships, alleging that in connection with her purchase of the BMW Z4 convertible, Century BMW impermissibly charged her an administrative fee. [R.p. 136, Amended Complaint ¶¶ 384-85.][3] She acknowledges that S.C. Code Ann. § 37-2-307 authorizes dealerships to charge such a fee, but alleges that Century BMW did not follow certain statutory requirements—without identifying which requirements were not followed. [R.p. 130-132, Amended Complaint ¶¶ 337-49.] She further alleges that even if Century BMW fully complied

[3] Although Mr. Watts co-signed for Ms. Watts's purchase from Century BMW and signed the arbitration agreement, he has not sued Century BMW based on the purchase and does not allege he purchased a vehicle from Century BMW. [R.p. 136, First Amended Complaint at ¶ 388 (alleging only a purchase from Toyota of Greenville).]

with § 37-2-307, its charging of a closing fee still violates the Dealers Act, S.C. Code Ann. § 56-15-10 *et. seq.* [R.p. 132, Amended Complaint ¶ 350.] Ms. Watts brought one count for violation of S.C. Code Ann. § 56-15-10 and another count for a declaratory judgment with respect to S.C. Code Ann. § 56-15-10 *et seq.* and/or § 37-2-307.

On December 29, 2006, pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, and the arbitration agreement that Ms. Watts executed, Century BMW moved to compel arbitration of Ms. Watts's claims and to dismiss this action. [R.p. 1100, Arbitration Agreement.]

In February and March 2007, both parties submitted memoranda regarding the motion to compel arbitration. [R.p. 160-172; R.p. 334-343, Def.'s Mem. & Reply Mem. in Support of Mot. to Compel Arb.; R.p. 201-207, Pls.' Mem. in Opp'n to Mot. to Dismiss pp. 29-35.] The circuit court postponed ruling on the motion in light of the South Carolina Supreme Court's intervening decision in *Simpson v. Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007), which addressed an arbitration agreement in a vehicle transaction.

In November 2007, both parties submitted supplemental memoranda addressing *Simpson*'s impact on Century BMW's motion. [R.p. 344-384, Def.'s Supp. Mem. in Support of Mot. to Compel Arb.; R.p. 385-420, Pl.'s Supp. Mem. Opposing Def.'s Mot. to Compel Arb.] On November 30, 2007, the circuit court heard oral argument, after which it granted limited discovery relating to the arbitration agreement. On January 29, 2008, Michael and Christine Watts were deposed and on January 30, 2008, Bobby Bishop, the General Manager of Century BMW, was deposed as a Rule 30(b)(6), SCRCP, corporate representative.

On February 18, 2008, both parties submitted additional supplemental memoranda. [R.p. 421-495, Def.'s Second Supp. Mem. in Support of Mot. to Compel Arb.; R.p. 496-642, Pl.'s Second Supp. Mem. Opposing Def.'s Mot. to Compel Arb.] On February 22, 2008, the parties submitted replies to the supplemental memoranda. [R.p. 643-666, Def.'s Second Reply Mem. in Support of Mot. to Compel Arb.; R.p. 667-741, Pl.'s Second Reply Mem. Opposing Def.'s Mot. to Compel Arb.]

On March 10, 2008, Judge Early denied Century BMW's Motion to Compel Arbitration of Ms. Watts's claims on the ground that the arbitration agreement is unconscionable. Century BMW timely appealed the denial two days later.

STANDARD OF REVIEW

Pursuant to S.C. Code Ann. § 15-48-200(a)(1), "[a]n appeal may be taken from . . . [a]n order denying an application to compel arbitration made under § 15-48-20 . . . ." Similarly, the Federal Arbitration Act ("FAA") states: "An appeal may be taken from . . . an order . . . denying an application under section 206 of this title to compel arbitration." 9 U.S.C. § 16(a)(1)(C). Therefore, as this Court held in *Towles v. United Healthcare Corp*, "an order that favors litigation over arbitration—whether it refuses to stay litigation in deference to arbitration [or] refuses to compel arbitration . . .—is immediately appealable, even if interlocutory." 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999) (internal quotation and emphasis omitted).

Arbitrability determinations are subject to *de novo* review. *Simpson*, 373 S.C. at 22, 644 S.E.2d at 667. A circuit court's factual findings must be reasonably supported by the evidence *Id.*

ARGUMENT

Ms. Watts does not contest that: (1) she executed the arbitration agreement, (2) the FAA applies to the agreement, and (3) her claims fall within the scope of the agreement. Consequently, pursuant to the FAA, the arbitration agreement is valid and enforceable, and Ms. Watts must arbitrate her claims. 9 U.S.C. § 1 *et seq.*; *see Green Tree Fin. Corp. – Al. v. Randolph*, 531 U.S 79 (2000).

Both federal and South Carolina law favor arbitration. Through the FAA, Congress endorsed arbitration as a less formal and more efficient means of resolving disputes than litigation. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 397, 498 S.E.2d 898, 903 (Ct. App. 1998) (internal citation omitted). The United States Supreme Court describes arbitration as an attractive method of resolving disputes because of its simplicity, informality, and expedience. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991).

The FAA and the federal policy favoring arbitration bind state courts. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001) (internal citation omitted). "[S]tates may not treat arbitration clauses differently from other contract provisions," and may not "singl[e] out arbitration provisions for suspect status." *Lackey*, 330 S.C. at 397, 498 S.E.2d at 903 (internal citation omitted).

Consistent with this federal requirement, South Carolina also has a strong policy favoring arbitration. *See Carolina Care Plan, Inc. v. United Healthcare Servs., Inc.*, 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2004). South Carolina courts give "due regard . . . to the federal policy favoring arbitration," *id.*, and "unless the court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should be ordered." *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118

(internal citation omitted). Accordingly, any doubts concerning enforceability of an arbitration agreement "should be resolved in favor of arbitration." *Id.*

I. The Circuit Court Erred By Reversing the Presumption Favoring Arbitration.

The circuit court violated the federal policy favoring arbitration. Rather than resolving any doubts in favor of arbitration, the circuit court did the exact opposite, saying that it approached the arbitration agreement with "considerable skepticism." [R.p. 4, Order p. 4.] The circuit court's "considerable skepticism"[4] violates the United State Supreme Court's mandate that state courts place arbitration agreements on equal footing with all other contracts. *See Lackey*, 330 S.C. at 397, 498 S.E.2d at 903 (citing *Doctor's Assocs. Inc. v. Casarotto*, 517 U.S. 81 (1996)). This Court should therefore reverse the circuit court's order as inconsistent with federal law and enforce the arbitration agreement.

II. The Circuit Court Erred in Finding the Agreement Unenforceable Despite the Wattses' Undisputed Opportunity to Read It.

The circuit court turned nearly a century of South Carolina precedent on its head by excusing the Wattses' failure to read the arbitration agreement they now complain about. The circuit court found it "unavailing" that the "Wattses could have read the agreement," noting that even if they had read it, it was "not easily understandable." [R.p. 6-7, Order pp. 6-7.] This reasoning is inconsistent with long-standing South Carolina law and the factual record in this case.

Under South Carolina law, every contracting party has a duty to read an agreement before signing it. *Burwell v. South Carolina Nat'l Bank*, 288 S.C. 34, 340

[4] The circuit court simply signed—without change—the lengthy order that plaintiffs' counsel submitted.

S.E.2d 786 (1986) (citing *J.B. Colt Co. v. Britt*, 123 S.E. 845 (1924)). Consonant with that duty, a party who is capable of reading an agreement but fails to do so is "bound by the terms thereof." *Sims v. Tyler*, 276 S.C. 640, 281 S.E.2d 229 (1981). In other words, a party cannot avoid the effect of an agreement by claiming he did not read it, *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003), because South Carolina courts will "not protect those who, with full opportunity to do so, will not protect themselves," *Britt*, 123 S.E. at 848.

This bedrock principle of contract law applies to arbitration agreements. In *Munoz v. Green Tree Fin Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001), the South Carolina Supreme Court refused to invalidate an arbitration agreement where the plaintiffs claimed that the defendant had not advised them that an arbitration clause was in the contract. *Id.* at 541, 542 S.E.2d at 365. The Court held that "a person who can read is bound to read an agreement before signing it." *Id.* This venerable state law principle, the Court held, was also compelled by the federal mandate that arbitration agreements "will not be set aside on the ground the arbitration clause was not noticed or explained since the party signing the agreement is presumed to have read it." *Id* at 541 n.6, 542 S.E.2d at 365.

The circuit court's Order ignores this basic tenet. The Wattses admit no one prevented them from reading the agreement and they were capable of reading it, but the circuit court found that because they did not read it—and thus did not understand it—they should not be held accountable for their signatures. Rather than focus on the Wattses' carelessness in not reading the agreement, the circuit court shifted the blame to Century

BMW, explaining that it would not enforce the agreement because the F&I manager never explained it to them. [R.p. 6-7, Order pp. 6-7.]

The circuit court's order was thus directly inconsistent with *Munoz* and with other South Carolina Supreme Court precedent. The law imposes no duty "to explain to an individual what he could learn from simply reading the document." *See Citizens & Southern Nat'l Bank v. Lanford*, 313 S.C. 540, 545, 443 S.E.2d 549, 551 (1994); *Towles*, 338 S.C. at 39, 524 S.E.2d at 845; *Regions Bank*, 354 S.C. at 664, 582 S.E.2d at 440. As long as a party had the ability and opportunity to read the agreement, he is bound by his signature. *See Sims*, 276 S.C. at 643, 281 S.E.2d at 230.

Here, the Wattses failure to read the agreement caused any failure to understand it. Mr. Watts testified that the agreement was readily identifiable as an arbitration agreement and perfectly readable. [R.p. 930, line 14-R.p. 931, line 21, Michael Watts Dep. pp. 51:14-52:21.] Their rush to leave the dealership as quickly as possible does not relieve them of the obligations they undertook in the contracts they signed.

If the circuit court's Order is upheld, a party would have an enormous incentive not to read agreements she signs so that if she later decides she does not like some of the terms, she can void the contract by suddenly claiming she did not understand it. How could consumer or business transactions proceed if parties are free to invalidate agreements by later claiming they did not read them? Under the circuit court's holding, the contract for the purchase of the vehicle itself could be voided because Ms. Watts claims not to have read that agreement as well. [R.p. 982, lines 22-22, Christine Watts Dep. p. 43:20-22.]

The circuit court's decision is also inconsistent with *Simpson v. Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007). In *Simpson*, the Court reaffirmed the presumption that "a party to a contract has read and understood the contract's terms." *Simpson*, 373 S.C. at 27-28, 644 S.E.2d at 670. It found the presumption rebutted in that case, however, because of the "inconspicuous nature of the arbitration clause," which was written in tiny print on the back of the contract, and was "embedded in paragraph ten (10) of sixteen (16) total paragraphs included on the page." *Id.*

In contrast, the arbitration agreement here is conspicuous. It is an easy-to-read, free-standing document with key portions bolded, underlined, and in all capital letters. [R.p. 1100, Arbitration Agreement; R.p. 1120, Michael Watts Dep. Ex. 1.] Mr. Watts admits that it would not have been difficult to read the entire agreement, which was clearly titled "**ARBITRATION AGREEMENT**." [R.p. 930, line 14-R.p. 931, line 21, Michael Watts Dep. pp. 51:14-52:21.] Thus, unlike in *Simpson*, the agreement here was conspicuous and there was no valid excuse for the Wattses' failure to read it.

As long as the Wattses had the ability and opportunity to read the arbitration agreement—a fact they do not contest—South Carolina law binds them to their signatures. Thus, the circuit court erred by denying the motion to compel arbitration.

III. The Arbitration Agreement Is Not Unconscionable Because the Wattses Did Not Lack a Meaningful Choice and the Agreement Does Not Contain Any Oppressive and One-sided Terms.

The circuit court also erred in finding the arbitration agreement unconscionable. Under South Carolina law, an agreement is unconscionable only when there is both an "absence of meaningful choice on the part of one party due to the one-sided contact provisions" *and* "terms which are so oppressive that no reasonable person would make

them and no fair and honest person would accept them." *Lackey*, 330 S.C at 395, 498 S.E.2d at 902 (quoting *Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 402, 472 S.E.2d 242, 245 (1996)); *Munoz*, 343 S.C. at 541, 542 S.E.2d at 365. *Simpson* emphasized "the importance of a case-by-case analysis" to address the unique circumstances and facts of each consumer transaction. 373 S.C. at 36, 644 S.E.2d at 674.

In *Simpson*, the South Carolina Supreme Court found an arbitration clause in a motor vehicle transaction to be unconscionable and unenforceable because Simpson lacked a meaningful choice in signing the agreement and the agreement contained oppressive, one-sided terms. This case is unlike *Simpson* because the Wattses had a meaningful choice and there are no one-sided terms.

A. Unlike in *Simpson*, the Wattses had a meaningful choice in agreeing to arbitrate.

The circuit court erred in finding that Ms. Watts "had an absence of meaningful choice when she entered into the arbitration agreement." [R.p. 8, Order p. 8.] *Simpson* set out the factors to consider in the meaningful choice analysis:

> courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.

Simpson, 373 S.C. at 25, 644 S.E.2d at 669.

The circuit court erroneously found the agreement at issue was a contract of adhesion, there was a disparity in the parties' bargaining power, the plaintiffs were not sophisticated, there was unfairness and surprise in the inclusion of the agreement, and the convertible was a "necessity." On each of these factors the circuit court relied on either a flawed reading of the record or a misapplication of the law.

i. The arbitration agreement was not a contract of adhesion.

The factual record established that the arbitration agreement was not a contract of adhesion because Century BMW did not require customers to sign the agreement to complete the deal.[5] An adhesion contract is "a standard form contract offered on a 'take-it-or-leave-it' basis," with non-negotiable terms. *Lackey*, 330 S.C. at 394, 498 S.E.2d at 901. To be an adhesion contract requires both that the terms are non-negotiable *and* that the contracting party is unwilling to waive enforcement in order to deal. *See Wingard v. Exxon Co.*, 819 F. Supp. 497, 503 (D.S.C. 1992); *see also Lackey*, 330 S.C. at 394, 498 S.E.2d at 901.

Here, the Wattses have not established, and cannot establish, that the arbitration agreement was an adhesion contract. The Watts transaction was thoroughly negotiated as they haggled extensively over the price and refused to enter into multiple other agreements the dealership proffered at the closing of the transaction. Moreover, Century BMW did not present the arbitration agreement on a "take it or leave it basis." An offeree faced with an adhesion contract has two choices: "complete adherence or outright rejection." *Lackey*, 330 S.C. at 394, 498 S.E.2d at 901. Here, the Wattses never faced such a choice. The Wattses admit no one told them they were required to sign the arbitration agreement. They admit they asked no questions about any documents. [R.p.

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[5] Adhesion contracts are not per se unconscionable. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 669 (citing *Lackey*, 330 S.C. at 395, 498 S.E.2d at 902). They are "part of the fabric of our society" and "obviously serve a very useful purpose in commerce" as "a rational and economically efficient response to the rapidity of market transactions and the high costs of negotiations." *Lackey*, 330 S.C. at 395-96, 498 S.E.2d at 902 (internal quotation omitted); *see also Am. Gen. Life & Acc. Ins. Co. v. Wood*, 429 F.3d 83, 88 (4th Cir. 2005) ("Since the bulk of contracts signed in this country, if not every major Western nation, are adhesion contracts, a rule automatically invalidating adhesion contracts would be completely unworkable.") (internal citation omitted)).

932, line 15-R.p. 934, line 4, Michael Watts Dep. pp. 53:15-55:4; R.p. 982, lines 16-22; R.p. 983, lines 14-19; R.p. 985, line 18-R.p. 986, line 11, Christine Watts Dep. pp. 43:16-22, 44:14-19, 46:18-47:11.] Moreover, they point to no statement or affirmative action indicating that their signatures were required or establishing that Century BMW was unwilling to consummate the transaction if they refused to sign. The circuit court's only evidentiary support for its finding appears in a footnote in which it notes Ms. Watts's ambiguous, unsupported allegation that she subjectively believed they were required to sign the arbitration agreement, without any articulation of **how** she came to believe that. [R.p. 4, Order p. 4 fn.1.] The record simply contains no objective evidence that the agreement was mandatory. Rather, it shows that (1) the Wattses were never told that the arbitration agreement was required, (2) neither of the Wattses asked any questions about the arbitration agreement, (3) neither of the Wattses voiced any objections to the arbitration agreement, and (4) the Wattses were eager to leave the dealership as quickly as possible. Moreover, it is undisputed that Century BMW's policy is to complete the transaction whether or not the customer signs the arbitration agreement and that the dealership has had customers refuse to sign the arbitration agreement and still purchase a vehicle. [R.p. 1029, line 24-R.p. 1130, line 18; R.p. 1093, line 4-R.p. 1095, line 5, John Robert "Bobby" Bishop Dep. pp. 22:24-23:18, 86:4-88:5.]

The court's decision also relies on the fact that Century BMW's General Manager could name only one customer during the deposition who purchased a vehicle without signing an arbitration agreement. [R.p. 4, Order p. 4.] This is a red herring. Mr. Bishop (Century BMW's General Manager) explained that the dealership handles deals in which a customer does not sign the arbitration agreement no differently than those in which the

customer does sign it; the deal is not flagged in any way. [R.p. 1130, lines 11-18; R.p. 1050, line 20-R.p. 1050, line 9, John Robert "Bobby" Bishop Dep. pp. 23:11-18; 43:20-44:9.] Since the General Manager of the dealership is not the dealership employee who interacts with the customer at the time the arbitration agreement is presented to and either accepted or not accepted by the customer, it is hardly surprising that he did not have at his finger tips the names of all of the customers who have previously declined to sign the arbitration agreement and still purchased vehicles. He testified unequivocally under oath, however, that he knew there were other customers, whose names he did not know, who have refused to sign the arbitration agreement and still purchased vehicles. [R.p. 1094, lines 10-14, John Robert "Bobby" Bishop Deposition p. 87:10-14.]

ii. The Wattses are well-educated, sophisticated consumers who exercised considerable bargaining power during the transaction.

The circuit court also erred in finding a "clear disparity in the parties' bargaining power" and that the plaintiffs were not sophisticated. [R.p. 5, Order p. 5] The Wattses are well-educated, savvy consumers who exerted significant bargaining power during the entire transaction with Century BMW. The record demonstrates that Ms. Watts was accompanied by her father, who had purchased nearly a dozen vehicles from other dealerships. For her part, at the time of the transaction Ms. Watts was highly-educated and about to attain a master's degree in accounting, had already worked at a prestigious accounting firm, and was about to begin a career founded upon the careful examination of documents. No one from the dealership pressured the Wattses to do anything they did not want to do: they negotiated below the sticker price of the vehicle, refused all additional product enhancements, and obtained outside financing. Indeed, the Wattses

did nearly everything a leading consumer's group recommends car buyers do when making a vehicle purchase, including (1) researching a variety of models, (2) test driving the vehicle, (3) negotiating by phone, (4) negotiating below the sticker price, (5) obtaining outside financing, (6) refusing to purchase additional features, and (7) selling the prior vehicle (Montero Mitsubishi) to an independent buyer rather than trading it in, Michael Watts Deposition at 57:5-9.[6] [R.p. 936, lines 5-9, Michael Watts Dep. p. 57:5-9.] As the Court is no doubt aware, car purchases are probably the most highly negotiated type of consumer transaction, with haggling and horse-trading being the rule rather than the exception. The Wattses knew that they could walk away from the negotiations for the transaction at any time and had, in fact, previously terminated earlier negotiations with another dealership because they were dissatisfied with the bargain offered. [R.p. 904, line 14-R.p. 906, line 4, Michael Watts Dep. pp. 25:14-27:4.] Therefore, the record demonstrates that the Wattses were not only sophisticated consumers, but also that they possessed and exercised considerable bargaining power during their transaction with Century BMW.

iii. The arbitration agreement is conspicuous and easily understandable.

The circuit court also found there was unfairness and surprise in the inclusion of the arbitration agreement because it was "inconspicuously placed" with other documents and was not easily understandable. [R.p. 6, Order p. 6.] Once again, the record demonstrates otherwise. Ms. Watts's arbitration agreement could hardly be more

[6] *See generally* ConsumerReports.org on Yahoo! Autos, *10 common car-buying mistakes*, http://autos.yahoo.com/consumerreports/article/common_car_buying_mistakes.html (last visited Feb. 14, 2008). Century BMW disagrees with some of what the article says, but notes that Mr. Watts seems to have followed most of the article's suggestions.

conspicuous—in sharp contrast to the clause in *Simpson*. Simpson's arbitration clause was a single-paragraph arbitration *clause* on the back of a form buyer's order (embedded within sixteen other clauses) that Simpson neither initialed nor otherwise independently agree to. Here, Ms. Watts signed a stand-alone *agreement*, conspicuously entitled "**ARBITRATION AGREEMENT**." [R.p. 1100, Arbitration Agreement; R.p. 1120, Christine Watts Dep. Ex. 1.] The full-page agreement required both of the Wattses signatures to indicate their assent. [R.p. 1100, id.; R.p. 1120, id.] Moreover, several provisions are in all capital letters, and clearly written: "IF A DISPUTE IS ARBITRATED, YOU AND WE WILL EACH GIVE UP OUR RIGHT TO A TRIAL BY THE COURT OR BY A JURY." [R.p. 1100, id.; R.p. 1120, id.] The final sentence of the agreement, which is in bold and all capital letters, states: "**BY SIGNING BELOW, THE PARTIES ACKNOWLEDGE THAT THEY HAVE READ AND AGREE TO THE TERMS OF THIS ARBITRATION AGREEMENT.**" [R.p. 1100, id.; R.p. 1120, id.] Because Ms. Watts signed a stand-alone arbitration agreement, which included unmistakable notice both of what she was signing and the consequences of her signature, the circuit court's finding that the agreement was inconspicuous is clearly erroneous. Moreover, Mr. Watts admits that the document is easily identifiable as an arbitration agreement and that it would not have been difficult to read the entire agreement. [R.p. 933, line 14-R.p. 934, line 21, Michael Watts Dep. pp. 51:14-52:21.] To the extent the Wattses were unaware of the implications of the arbitration agreement, they have solely themselves to blame as any haste in signing the documents came from them alone; they were in a rush to get out of the dealership "as quickly as possible." The F&I manager put no pressure on them to sign the agreement. [R.p. 929, lines 2-14,

Michael Watts Dep. p. 50:2-14.] Thus, had the Wattses taken the time to read the agreement, they would have been aware of its consequences.

iv. The 2004 Z4 BMW convertible was not a necessity.

Finally, the purchase of a 2004 Z4 BMW convertible was not a "necessity." Ms. Watts had a working vehicle and did not need to buy a luxury convertible to get to and from work. Moreover, the Wattses were well aware that they had other options in purchasing a vehicle, having visited other dealerships in their search for this graduation gift. [R.p. 904, lines 13-23, Michael Watts Dep. p. 25:13-23.]

Therefore, the record demonstrates that the arbitration agreement was not mandatory and that Ms. Watts did not lack a meaningful choice in agreeing to arbitrate.

B. Ms. Watts's arbitration agreement lacks any oppressive, one-sided terms.

In addition to erring in finding a lack of meaningful choice, the circuit court also erred in finding the arbitration agreement had oppressive, one-sided terms that no reasonable person would make or accept, an independent ground requiring reversal of the ruling below.

Simpson found a number of unconscionable provisions in the arbitration agreement there; none is in the Wattses' arbitration agreement. Moreover, although plaintiffs' counsel represents that there are 1100 words in the arbitration agreement, [R.p. 1070, line 16, John Robert "Bobby" Bishop Dep. p. 63:16], in all of those words, plaintiffs' counsel has found only one provision that they contend is unconscionable: a provision requiring individual, rather than class, treatment of claims. [R.p. 1070, line 16, John Robert "Bobby" Bishop Dep. p. 63:16] The *Simpson* arbitration clause, however, also contained a class action waiver and the South Carolina Supreme Court had the

opportunity to examine that provision and did not find it unconscionable. The circuit court's finding that the provision requiring individual treatment of claims prevented Ms. Watts from effectively vindicating her rights in arbitration is inconsistent not only with *Simpson* but also with binding federal authority.

i. The majority of jurisdictions addressing arbitration agreements with class action waivers—and the only two decisions with binding authority on this Court—have upheld such provisions.

The great weight of authority has found that clauses requiring individual treatment of claims are reasonable and enforceable. *See, e.g., Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 878 (11th Cir. 2005), *cert. denied* 126 S. Ct. 1457 (2006).[7] That certain litigation devices—including representative actions—may not be available in an arbitration "is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition' [—] characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims.'" *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 US 20, 31 (1991)); *see also Caley v. Gulfstream Aerospace Corp.*, 428 F.3d

[7] *See also Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) (precluding class arbitration "does not leave the plaintiffs without remedies"); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 374 (3d Cir. 2000); *Champ v. Siegel Trading Co.*, 55 F.3d 269, 277 (7th Cir. 1995); *Delta Funding Corp. v. Harris*, 189 N.J. 28 (2006); *Edwards v. Blockbuster, Inc.*, 400 F. Supp. 2d 1305, 1309 (E.D. Okla. 2005) ("Such provisions are a common feature of consumer arbitration agreements, and numerous courts have recognized that they are valid and fully enforceable."); *Rains v. Found. Health Sys Life & Health*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001) ("[A]rbitration clauses are not unenforceable simply because they might render a class action unavailable."); *Gay v. Creditinform*, 511 F.3d 369 (3rd Cir. Dec. 21, 2007); *Davidson v. Cingular*, 2007 WL 896349, No. 2:06CV00133-WRW (E.D. Ark. 2007).

1350 (11th Cir. 2005). In fact, had Ms. Watts abided by her agreement to arbitrate, it is almost a certainty that her claim would already have been resolved.

Two decisions that bind this Court did not find class action waivers unconscionable. The *Simpson* Court found that the arbitration clause there "contained a total of three unconscionable provisions," none of which was the requirement for individual treatment of claims. *Simpson*, 373 S.C. at 35 n.9, 644 S.E.2d at 674. The court stressed throughout its decision that it would not enforce any provision that "is violative of policy, statutory law, or provisions of the Constitution." *Id.* at 33, 644 S E.2d at 673. Thus, if the provision precluding the class treatment of claims violated the Dealers Act—the statutory basis for Simpson's claims—the court would have expressly found it unconscionable. But it did not do so, confirming that such provisions are, in fact, enforceable.

Likewise, the United States Supreme Court's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), compels the conclusion that class action waivers are enforceable. There, the Court held that it was for an arbitrator to determine whether the arbitration clause at issue precluded class-wide arbitration. *Id.* at 454. By permitting the arbitrator to decide whether the clause prevented class-wide arbitration, the Supreme Court recognized that class preclusion was permissible; after all, if class preclusion were per se invalid, then the Court would have just said so and not directed the arbitrator to determine whether the agreement allowed for class actions. *See also Kinkel v. Cingular*, 223 Ill. 2d 1, 19 (2006) ("The Court's holding in *Green Tree* . . . suggest[s] that an arbitration agreement expressly waiving the ability to arbitrate class claims is enforceable.").

Snowden v. Checkpoint Check Cashing, 290 F.3d 631, 638 (4th Cir. 2002), has the same effect. There, the United States Court of Appeals for the Fourth Circuit, upon which *Simpson* relied,[8] rejected an attack on a class action waiver in the context of a consumer protection statute. The plaintiff, who sued, *inter alia*, under the Maryland Consumer Protection Act, claimed that the waiver violated public policy because it precluded her from attracting legal representation given her modest claim for damages. *Snowden*, 290 F.3d at 638-39. The Fourth Circuit disagreed. First, it held that because the prevailing party could recover attorneys' fees, the plaintiff had sufficient ability to obtain legal representation. *Id.* at 638. Second, it "rejected as meritless" the argument that the agreement violated public policy, holding that such logic failed to place arbitration agreements on equal footing with other contracts. *Id.* at 639. The Fourth Circuit emphasized that the "agreement placed no limitations upon the substantive remedies available to Snowden in arbitration."[9] *Id.* As in *Snowden*, the arbitration agreement here is valid and enforceable because Ms. Watts can recover attorneys' fees and the agreement places no limitations on the substantive remedies she can recover in arbitration. [R.p. 1100, Arbitration Agreement; R.p. 1120, Christine Watts Dep. Ex. 1.]

ii. The arbitration agreement does not inhibit a customer's ability to bring a claim against Century BMW.

Ms. Watts is able to vindicate her claims under the arbitration agreement inexpensively. Century BMW must pay for nearly all arbitration costs, including the filing fee in excess of the cost of the court filing fee. [R.p. 1100, id.; R.p. 1120, id.] The

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[8] *See Simpson v. Myrtle Beach, Inc* , 373 S.C. at 668-69 (2007).

[9] Invalidating Ms. Watts's arbitration agreement would thus create a split between state and federal courts in South Carolina.

agreement is also subject to the American Arbitration Association ("AAA") rules, which require the dealership to pay the entire arbitrator's fee in excess of $125. [R.p. 665, American Arbitration Rules; R.p. 1120, Christine Watts Dep. Ex. 1.] Additionally, under the agreement, attorneys' fees and costs are recoverable in accordance with the applicable law.[10] [R.p. 1100, Arbitration Agreement; R.p. 1120, id.]

The agreement also grants Ms. Watts the right to forego arbitration entirely. If a customer wants to avoid arbitration, the agreement allows her to do so by bringing a claim in small claims court. [R.p. 1100, id.; R.p. 1120, id.]

Thus, a consumer can easily and inexpensively pursue a claim against Century BMW.

iii. The arbitration agreement explicitly places no limits on Ms. Watts's remedies.

The circuit court incorrectly held that the arbitration agreement prevents Ms. Watts from effectively vindicating her rights under the Dealers Act. When evaluating arbitration agreements with class action waivers, courts generally focus on whether the agreement limits a party's ability to receive remedies in arbitration. In *Simpson*, for example, the court focused on whether the arbitration clause limited the plaintiff's ability to receive damages. *Simpson*, 373 S.C. at 28. There, the clause precluded the arbitrator from awarding punitive, double, or treble damages, *Simpson*, 373 S.C. at 28, which prevented Simpson from receiving the "statutory remedies to which she may be entitled in her underlying . . . Dealers Act claim[]." *Simpson*, 373 S.C. at 30. Likewise, in the

[10] *See, e.g., Jenkins v. First American Cash Advance of Ga., LLC*, 400 F.3d 868 (11th Cir. 2005) (arbitration agreement permitted consumers to vindicate their statutory rights because it expressly permitted consumers to recover attorneys' fees and costs); *Snowden*, 290 F.3d at 638.

minority of courts that have found class action waivers invalid, typically the arbitration agreement removed some remedies, such as attorneys' fees or certain damages.[11] *See, e.g., Dale v. Comcast*, 498 F.3d 1216 (11th Cir. 2007) (distinguishing Eleventh Circuit cases upholding class action waivers on the basis that the plaintiffs in those cases could recover attorneys' fees and costs); *Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300, 313-14 (Mo. App. 2005) (arbitration clause required customers to bear the costs of arbitration and prohibited an award of incidental, consequential or exemplary damages, or attorney fees).

Here, the arbitration agreement—on its face—does not limit Ms. Watts's remedies. It unambiguously authorizes an arbitrator to award "those damages or other relief allowed by [the] governing law," including "fees, costs, injunctive or equitable relief in accordance with this Agreement and applicable law." [R.p. 1100, id.; R.p. 1120, id.] Ms. Watts is not precluded from recovering statutory damages. The agreement authorizes any award of attorneys' fees and costs that applicable law permits. [R.p. 1100, id.; R.p. 1120, id.] Moreover, despite the circuit court's assertion otherwise, the agreement explicitly grants the arbitrator the ability to award injunctive or equitable relief.[12] [R.p. 1100, id.; R.p. 1120, id.]

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[11] Requiring claims to be treated on an individual basis is not a limitation of a substantive remedy. *See, e.g., Strand v U.S. Bank Nat'l Ass'n ND*, 693 N.W.2d 918, 926 (N.D. 2005) ("[R]estricting the availability of a class action is not, by itself, a restriction on substantive remedies . . . . A class action is not a substantive remedy.").

[12] The circuit court's invalidation of the arbitration agreement because it does not provide for broad equitable relief is erroneous as a matter of law and baseless as a matter of fact. [R.p. 10, Order p. 10.] The United States Supreme Court previously addressed—and rejected— this argument in *Gilmer v. Interstate/Johnson Corp.*, 500 U.S. 20, 31 (1991). First, the Court held that arbitrators have the power to fashion equitable relief and the applicable arbitration rule did not restrict the types of relief an arbitration could award, including equitable relief. Second, the Court noted that even if the arbitration could not

Without any limitations on Ms. Watts's possible remedies, the Court should hold—consistent with *Greentree, Simpson*, and *Snowden*—that the class action waiver is valid and enforceable.

CONCLUSION

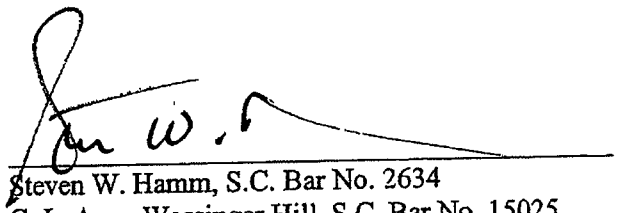
For the reasons set forth above, Century BMW respectfully requests that this Court reverse the circuit court's Order and direct the circuit court to enter an order compelling arbitration of Ms. Watts's claims against Century BMW in accordance with the terms of the arbitration agreement and dismissing her claims currently pending in the circuit court.

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proceed as a class action, that the statute "provides for the possibility of collective action does not mean that individual attempts at conciliation were intended to be barred." *Id.* Finally, the Court found it significant that the arbitration agreement did not preclude the Equal Employment Opportunity Commission from bringing actions seeking class-wide equitable relief.

The same is true here. First, not only do arbitrators have the power to fashion equitable relief, but Ms. Watts's agreement, on its face, provides for all relief *including equitable relief.* Second, that the Dealers Act provides for the possibility of collective action does not make the right to bring a class action under the Dealers Act an unwaivable right. *See also Johnson v. West Suburban Bank*, 225 F.3d 366, 377 (3rd Cir. 2000); [R.p. 1100, Arbitration Agreement.] Indeed, *Simpson* did not find that the class preclusion clause there violated the Dealers Act. Finally, the South Carolina Attorney General's office is authorized to seek class-wide equitable relief for any violations of the Dealers Act. S.C. Code Ann. §56-15-40.

Respectfully submitted,



October 6, 2008

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, Circuit Court Judge

Circuit Court Case No.: 2006-CP-02-1230

Court of Appeals Docket No.: 03-27371

Heather Herron, Natalie Armstrong, Michael Ruiz, Julie Freeman, Christine Watts, Michael Blease and Michael Watts, individually and for the benefit of all car buyers whom paid "administrative fees" as described below to Defendants, Respondents,

v.

Century BMW d/b/a Sonic Automotive, Dick Dyer & Associates, Inc., Galeana Chrysler Plymouth, Inc. a/k/a Galeana Chrysler Jeep, Inc., J.L.H. Investments, LP a/k/a Hendrick Honda Overland, Inc., d/b/a Land Rover of Columbia, Taylor Toyota a/k/a Taylor Investments, Inc., and Toyota of Greenville, Inc.,

Defendants,

of whom Century BMW d/b/a Sonic Automotive is the Appellant.

RESPONDENTS' FINAL BRIEF

Rec'd 10/08

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COUNTER STATEMENT OF ISSUES ON APPEAL

I. Are the Circuit Court's Factual Findings Supported by the Evidence and Thus, Should the Order Denying Century BMW's Motion to Compel Arbitration be Affirmed?
(Appellant's Issues III, IV, V, and VI.)

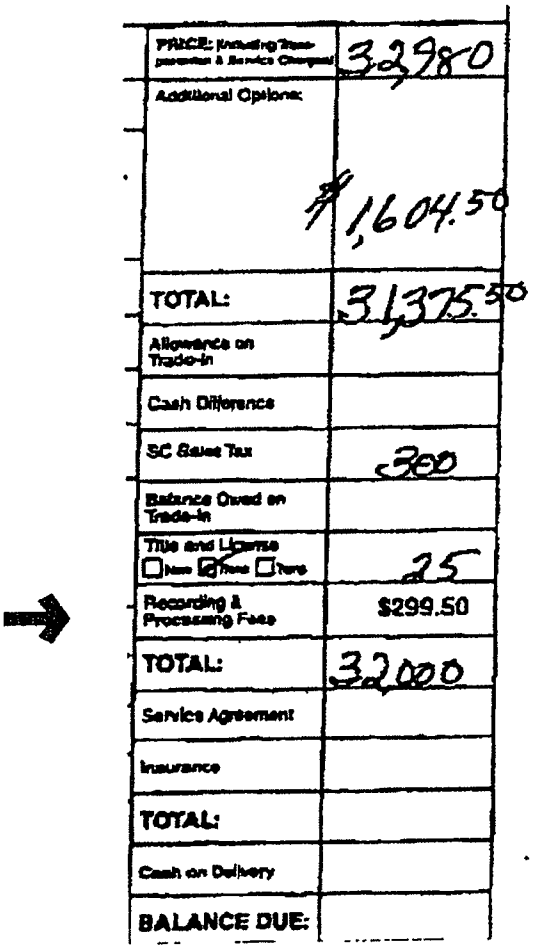
II. Was the Circuit Court Correct in Holding the Arbitration Agreement to be Unenforceable When the Facts in This Case are Just Like Those in Simpson?

III. Did the Circuit Court Correctly Follow the Simpson Court in Viewing the Century BMW Arbitration Agreement With "Considerable Skepticism?"
(Appellant's Issue I.)

IV. Was the Circuit Court Correct in Following the Ruling in Simpson That the Presumption that a Party Has Read and Understood a Contract Does Not Mandate Enforcement of Every Arbitration Agreement?
(Appellant's Issue II.)

COUNTER STATEMENT OF THE CASE

This case was initiated on August 29, 2006. ROA, p. 39. Plaintiffs allege that Appellant Century BMW d/b/a Sonic Automotive ("Century BMW") and the other Defendant Car Dealers are charging illegal procurement fees (often referred to as an "administrative fee," "recording and processing fee," "closing fee," or "dealer documentation and closing fees" (collectively "administrative fees.")). Respondent Century BMW's invoice provides in part:



PRICE: [illegible]	32980
Additional Options:	$1,604.50
TOTAL:	31,375.50
Allowance on Trade-in	
Cash Difference	
SC Sales Tax	300
Balance Owed on Trade-in	
Title and License ☐ None ☑ Fees ☐ Tare	25
Recording & Processing Fees	$299.50
TOTAL:	32000
Service Agreement	
Insurance	
TOTAL:	
Cash on Delivery	
BALANCE DUE:	

ROA, p. 1104. The pre-printed and typed-in "Recording and Processing Fees" ($299.50) above is an illegal administrative fee.

The illegal administrative fees are deliberately placed as separate line items on Defendant Car Dealers' invoices. These illegal administrative fees are often placed along with mandatory fees, such as taxes, tags, and title. As here, this implies that the illegal administrative fees, like the payment of taxes, fees for tags, and fees for obtaining title, are separate set fees and that there is no option but to pay the administrative fee with every car purchase. Consequently, car buyers purchase cars based on the total sticker price and are mislead into believing that any discount received is off of the sticker price and that additional illegal administrative fees are special mandatory fees.[1]

Plaintiffs allege that Defendant Car Dealers are charging administrative fees in violation of statutory law *inter alia* S.C. Code Ann. § 37-2-307. S.C. Code Ann. § 37-2-307 is a consumer protection statute that allows a dealership to do what would otherwise be illegal, charge administrative fees, only if the dealership follows strict rules. S.C. Code Ann. § 37-2-307 provides:

> Every motor vehicle dealer charging closing fees on a motor vehicle sales contract shall pay a one-time registration fee of ten dollars during each state fiscal year to the Department of Consumer Affairs. The closing fee must be included in the advertised price of the motor vehicle, disclosed on the sales contract, and displayed in a conspicuous location in the motor vehicle dealership.

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[1]Defendant Car Dealers' conduct is not unlike that found to be an unfair trade practice by an Ohio Court in Motzer Dodge Jeep Eagle, Inc. v. Ohio Attorney General, 642 N.E.2d 20 (Oh. Ct. App. 1994). In 1996, the South Carolina Supreme Court also suggested that charging administrative fees is an unfair trade practice. "[W]e do not imply that such [C]losing fees may not be attacked on other grounds, such as claims for fraud, misrepresentation or unfair trade practices." Fanning v. Fritz Pontiac-Cadillac Buick, 322 S.C. 399, n. 8, 472 S.E.2d 242, n. 8 (1996).

This statute is designed to protect the public and sets forth strict rules that Plaintiffs allege the Defendant Car Dealers have not followed.

Plaintiffs allege Defendant Car Dealers have not availed themselves of the limited exceptions in S.C. Code Ann. § 37-2-307 and that every Defendant Car Dealer did one or more of the following illegal acts:

a. failed to register with the Department of Consumer Affairs. ROA, p. 1177. (sample chart showing dealers that failed to register);

b. failed to individually register annually with the Department of Consumer Affairs;

c. charged illegal "administrative fees" in excess of the amount for which it registered;

d. failed to disclose the illegal "administrative fees" on sales contracts;

e. charged illegal "administrative fees" in excess of their costs. ROA, p. 1186 (chart showing how some car dealers unreasonably charge administrative fees solely for profit);

f. failed to display the charging of illegal "administrative fees" in a conspicuous location in the dealership;

g. advertised deceptively and illegally by failing to include the "administrative fees" in the advertised price. ROA, pp. 1179-1184 (examples of car dealer advertising which fails to disclose the administrative fee in the advertised price as required by S.C. Code Ann. § 37-2-307); and

h. created a closing procedure to illegally add "administrative fees."

Respondent Christine Watts and the other Plaintiffs in this case are South Carolina consumers whom paid illegal administrative fees. Plaintiffs have filed an Amended Complaint which alleges three causes of action:

1. Violation of S.C. Code Ann. § 56-15-110 *et. seq.* ("Dealers Act");
2. Civil Conspiracy; and
3. Declaratory Judgement to determine rights and legal relations under S.C. Code Ann. § 56-15-10 and/or S.C. Code Ann. § 37-2-307 ("Consumer Protection Code").

ROA, pp. 77-147. Respondents are bringing this action both individually and pursuant to S.C. Code Ann. § 56-5-110 for the benefit of all others who paid "administrative fees" to Defendant Car Dealers.

The South Carolina General Assembly has expressly provided that Respondents can bring this action on behalf of all persons who paid an administrative fee. S.C. Code Ann. § 56-15-110 provides:

(1) In addition to temporary or permanent injunctive relief as provided in § 56-15-40(3)(C), any person who shall be injured in his business or property by reason of anything forbidden in this chapter may sue therefor in the court of common pleas and shall recover double the actual damage by him sustained, and the cost of suit, including a reasonable attorney's fee.

(2) **When such action is on of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for benefit of the whole, including actions for injunctive relief.**

(3) In an action for money damages, if the jury finds that the Defendant acted maliciously, the jury may award punitive damages not to exceed three times the actual damages.

(4) A final judgment, order or decree rendered against a person in any civil, criminal or administrative proceeding under the United States antitrust laws, under the Federal Trade Commission Act, or under this chapter shall constitute prima facie evidence against such person subject to the conditions of the United States Antitrust Law (15 U.S.C.16).

S.C. Code Ann. §56-15-110 (emphasis added).

The initial Complaint included four Plaintiffs and multiple car dealers.[2] ROA, pp. 44-59. On October 31, 2006, prior to any Defendant Car Dealers' Answer, Respondents filed a First Amended Complaint which included Respondent Christine Watts and claims against Appellant Century BMW. ROA, pp. 77-147. On February 5, 2008, Judge Early granted a motion to dismiss filed by the Plaintiffs, which dismissed without prejudice all but the seven Defendants in this action.[3] ROA, p. 14.

On December 29, 2006, Appellant Century BMW filed the motion to compel arbitration at issue. ROA, p. 151. On March 9, 2007, Respondent Watts submitted a brief addressing the motion to compel arbitration, as part of Plaintiff's Memorandum in Opposition to Motions to Dismiss. ROA, p. 173. Appellant Century BMW submitted a brief in support of the motion on March 26, 2007. ROA, p. 334.

On March 26, 2007, the South Carolina Supreme Court, in Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 30, 644 S.E.2d 663, 671 (S.C. 2007), issued an opinion that governs the issues in this motion.[4] In November 2007, Respondent Christine Watts and Appellant Century BMW submitted a second memorandum addressing the Simpson case. ROA, p. 344; ROA, p.

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[2]Respondents' counsel's investigation at that time had revealed that the charging of the illegal administrative fees was an industry-wide cheating technique. Because the charging of illegal administrative fees was industry-wide and the action was of "common or general interest to many persons" it was therefore appropriate under S.C. Code Ann. §56-15-110(2) for Respondents to bring the action against multiple defendants.

[3]The effect of the this ruling was to make the Herron case a seven Plaintiff and seven Defendant action. This motion was filed to address Judge Early's serious concerns on whether the named Plaintiffs had standing to sue Defendants with whom they had not transacted business.

[4]The United States Supreme Court denied certiorari on this decision – MSA of Myrtle Beach v. Simpson, 128 S.Ct. 493 (U.S.2007).

385.

This motion was argued on November 30, 2007. At the hearing, the Court gave the parties the option to take depositions concerning the arbitration agreement. The parties took depositions on January 29, 2008 and January 30, 2008. On February 18, 2008, both parties submitted additional supplemental memoranda based on the deposition testimony. ROA, p. 496; ROA, p. 421. On February 22, 2008, the parties submitted replies to the supplemental memoranda. ROA, p. 643; ROA, p. 667.

On March 10, 2008, the circuit court denied Century BMW's motion to compel arbitration. ROA, p. 1. Century BMW served its notice of appeal on March 12, 2008.

STATEMENT OF FACTS[5]

On January 25, 2005, Plaintiff Christine Watts, a twenty-four year old college student, and her father, Michael Watts, a garage door salesman, purchased a car from Defendant Century BMW. ROA, p. 896, l. 15 - ROA, p. 897, l. 8; ROA, p. 1127; ROA, p. 1101, ¶ 2; ROA, p. 948, ll. 14-20. The vehicle was a graduation present for Ms. Watts. ROA, p. 902, ll. 11-14. The car was purchased to be Ms. Watts's primary source of transportation and was needed so that she could get back and forth to work. ROA, p. 998, ll. 11-20.

After the parties agreed to a price for the car, Century BMW's F&I manager took Ms. Watts and her father into a small cubicle to sign paperwork. ROA, p. 919, ll. 21-25; ROA, p. 928, ll. 9-21; ROA, p. 1025, ll. 15-18; ROA, p. 1025, ll. 23-25; ROA, p. 978, ll. 3-14. Christine

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[5]Respondent Christine Watts's and her father, Michael Watts's, recollections of the events surrounding the execution of the Century BMW arbitration agreement are undisputed. Nobody from Century BMW remembered this transaction. ROA, p. 1015, l. 19 to ROA, p. 1016, l. 12; ROA, p. 1017, ll. 7-22; ROA, p. 1020, ll. 12-16; and ROA, p. 1024, ll. 15-19.

Watts in her affidavit stated that the documents were "hastily presented." ROA, p. 1101, ¶ 4. Century BMW refers to this process as "rolling out the paper." ROA, p. 1025, ll. 15-18 and ROA, p. 1025, ll. 23-25.

The Wattses say they were presented with a big packet of documents containing flags indicating where the Wattses were supposed to sign. ROA, p. 932, ll. 10-20; ROA, p. 990, l. 2 - ROA, p. 991, l. 17. The Wattses signed at least eight different documents.[6] Copies of documents provided by Century BMW signed by the Wattses. Multiple copies of some of the documents were signed by the Wattses. ROA, p. 985, ll. 9-11. At least three of the eight documents presented in the packet were required to be signed by law. ROA, p. 1066, ll. 1-16; ROA, p. 1067, ll. 10-19; ROA, p. 1073, ll. 13-18; ROA, p. 1074, l. 21 to ROA, p. 1075, l. 4. *See also* ROA, p. 930, ll. 7-13. The Century BMW representative whom met with the Watts in the cubicle was the Finance and Income Manager (F&I manager). ROA, p. 1026, ll. 8-19.

The arbitration agreement at issue was one of the documents mixed within the packet. ROA, p. 1022, ll. 7-17. The arbitration agreement is a form contract drafted by Century BMW. ROA, p. 1044, ll. 7-14. The arbitration agreement uses a small font. ROA, p. 1100.

The Wattses say there was no discussion with the Century BMW F&I manager about the

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[6]Century BMW makes an untrue statement that the Wattses "refused to sign at least ten different agreements" in support of an argument that signing the arbitration agreement was optional. Century BMW brief, p. 5. Century BMW is referring to one document that was signed by Michael Watts. See ROA, p. 1108. This document list items that Century BMW explained and tried to "sell" to the Wattses. ROA, p. 920, ll. 3-14 and ROA, p. 922, ll. 7-11. This document on its face states that "All products are optional." ROA, p. 1108. The fact that the Wattses did not purchase items that were explained to them and signed a document that states that "All products are optional" has nothing to do with whether signing the arbitration agreement was optional.

arbitration agreement. ROA, p. 986, ll. 12-15. Century BMW's General Manager did not know what was discussed with the Wattses but stated that he would expect his people to tell the customer that the agreement is "a document providing a remedy for the customer without having to go to court." ROA, p. 1023, l. 8 to ROA, p. 1024, l. 10. The General Manager testified as follows:

Q: Can you sit here and tell me what this form contains?
A. I'm not an expert, but I can tell you that this is a document providing remedy for the customer without having to go to court.
Q. If you were to explain it, that's what you would say?
A. Yes, sir.
Q. Is there anything else you'd tell them other than it's a remedy for the customer and you don't have to go to court?
. . .
A. No, sir, I would tell them nothing else.
Q. Okay. And is that what you expect your employees to tell the -- the people?
A. They're more informed than I.
Q Well, is that what you expect them to tell them, at least that?
A. At least that.
Q. Okay. Is there anything else you expect to tell -- them to tell them?
A. No, sir.

Id. Anyone would sign the arbitration agreement if given the misleading explanation touted by Century BMW's General Manager.

The General Manager stated that the F&I Manager's "practice" was to present the individual documents and point to where the customer was supposed to sign. ROA, p. 1029, l. 14 - ROA, p. 1030, l. 1. The F&I Manager would place his finger on the document and say "sign here." ROA, p. 1029, l. 1 - ROA, p. 1030, l. 1. This practice leads to only one conclusion, that

signing the document is required in order to purchase a car.[7]

The Wattses understood that they were required to sign the arbitration agreement in order to purchase the car. Christine Watts's affidavit provides as follows: "The 'Arbitration Agreement' was not discussed or explained to me and was given to me on a 'take-it-or-leave-it' basis." ROA, p. 1101, ¶ 5. The Wattses, in their depositions, testified that they believed they were required to sign the arbitration agreement in order to purchase the car. Michael Watts testified as follows:

> Q. And I take it, from what you've said, you didn't object to signing the document at the time.
> A. I didn't know I didn't have to.

ROA, p. 993, ll. 10-12. Christine Watts stated:

> Q. Okay. Let's go to Number 14 [arbitration agreement]. Okay? Was CBM-14 passed to you?
> A. I'm sure that it was in the packet.
> Q. Okay. Is that your signature?
> A. That is correct.
> Q. Did you know what you were signing?
> A. No, I did not.
> Q. Why did you sign it?
> A I thought I had to to buy the car.

ROA, p. 989, ll. 10-18. Ms. Watts also stated:

> Q. Okay. Okay. Were you of the opinion you had to buy -- that you had to sign the

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[7]This conclusion is further supported by the fact that in over 6,000 transactions, the only person the General Manager could name who was ever allowed to buy a car without signing the arbitration agreement was Brad Martin, Esq., a lawyer for the Defendant Car Dealers in this case. ROA, p. 1037, l. 19 to ROA, p. 1038, l. 14 and ROA, p. 1056, ll. 20-23. Century BMW sells 1,200 cars annually, has used the arbitration agreement since at least 2002, and the General Manager can only recall the lawyer in this case, whom was allowed to buy a car without signing the arbitration agreement. Id.

documents where presented with the flags in order to get the car, or not?

. . .

A. Yes.

. . .

Q. Okay. Any doubt in your mind about that?

. . .

A. No.

ROA, p. 997, ll. 6-17.

Q. Certainly. Why did you think you had to sign any or all of these documents in order to get the car?

A. The way it was presented, I just thought I had to sign everything.

ROA, p. 990, ll. 2-6. The Wattses testimony is clear and the Wattses are the only ones who remember the transaction.

ARGUMENT

I. The Circuit Court's Findings are Supported by Evidence and the Order Denying Century BMW's Motion to Compel Arbitration Should be Affirmed.

The circuit court correctly found that Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 30, 644 S.E.2d 663, 671 (S.C.2007) is the controlling authority. The Simpson court held a car dealer's attempt in a form contract to prevent a consumer from prosecuting statutory rights in arbitration was unconscionable and unenforceable. Simpson, 644 S.E.2d at 668-671. The circuit court correctly applied the Simpson analysis to the facts at issue and found that the Century BMW arbitration agreement to be unenforceable. Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 22, 644 S.E.2d 663, 667 (S.C.2007).

The circuit court's factual determinations on arbitrability should be affirmed if there is "any evidence" reasonably supporting the findings.

> Arbitrability determinations are subject to *de novo* review. Nevertheless, **a Circuit Court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings.**

Id. (emphasis added)(internal citations omitted). As discussed below, the evidence here reasonably supports the circuit court's findings that : (A) the Century BMW arbitration agreement is an adhesion contract; (B) the Wattses had an absence of meaningful choice in entering into the arbitration agreement; and (C) the arbitration agreement contains one-sided and oppressive terms. Accordingly, the circuit court's order denying the motion to compel arbitration should be affirmed.

A. The Century BMW Arbitration Agreement is an Adhesion Contract.

The evidence reasonably supports the circuit court's finding that the arbitration agreement is an adhesion contract. "[A]n adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." Simpson, 644 S.E.2d at 669. Adhesion contracts "are standard in the automobile retail industry." Id.

The arbitration agreement is a standard form contract drafted by Century BMW. ROA, p. 1044, ll. 7-14. The arbitration agreement has only blanks that can be filled in depending on the date of the transaction, the VIN number of the vehicle, the name of the customer, and the name of the dealership [Century BMW's parent company, Sonic Automotive, Inc., owns multiple car dealerships]. ROA, p. 1100.

Similarly, the evidence reasonably supports the finding that Century BMW presents the arbitration agreement on a take-it-or-leave-it basis with terms that were not negotiable. Century BMW's procedures and method of presentation lead to the conclusion that the arbitration

agreement must be signed to purchase the car. Century BMW's General Manager stated that the F&I Manager's "practice" was to present the individual documents and place his finger on the paper, pointing to where the customer was supposed to sign and say "sign here." ROA, p. 1029, l. 1 - ROA, p. 1030, l. 1. This practice indicates that signing the document is required in order to purchase a car. This conclusion is further supported by the fact that in over 6,000 transactions, the only person the General Manager could name who ever bought a car without signing the arbitration agreement was Brad Martin, Esq., a lawyer for the Defendant Car Dealers in this case. ROA, p. 1037, l. 19 - ROA, p. 1038, l. 14 and ROA, p. 1056, ll. 20-23.

The Wattses testimony shows that Century BMW presents its arbitration agreement on a take-it-or-leave-it basis.

> Q. Certainly. Why did you think you had to sign any or all of these documents in order to get the car?
> A. The way it was presented, I just thought I had to sign everything.

ROA, p. 997, ll. 6-17; ROA, p. 990, ll. 2-6. *See also* ROA, p. 1101, ¶ 5 ("The 'Arbitration Agreement' was not discussed or explained to me and was given to me on a 'take-it-or-leave-it' basis."); ROA, p. 993, ll. 10-12. Moreover, Plaintiff Watts did not participate in the drafting of the arbitration agreement and had no voice in the formulation of its terms. ROA, p. 1102, ¶ 6.

Century BMW's procedures and the Watts's testimony[8] show that the terms of the arbitration agreement were not negotiable. Furthermore, the arbitration agreement is undisputably a form contract. Thus, the evidence reasonably supports the circuit court's finding that the arbitration agreement is an adhesion contract.

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[8]The Wattses' testimony is the only testimony about the events surrounding the execution of the agreement. The Wattses testified they believed they were required to sign the agreement in order to get the car. Century BMW was unable to produce any witness whom remembered the transaction.

B. The Wattses Had an Absence of Meaningful Choice in Entering Into the Arbitration Agreement.

The circuit court's finding that there was an absence of meaningful choice in agreeing to arbitrate and waive the statutory right to participate in a multi-plaintiff action is supported by the evidence. The Simpson case describes the absence of meaningful choice as follows:

> Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. In determining whether a contract was "tainted by an absence of meaningful choice," courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.

Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. at 25, 644 S.E.2d at 669 (internal citations omitted).

Because an automobile is a "necessity" in everyday life, the Simpson Court found this factor should be considered in determining "whether a consumer had a meaningful choice in negotiating the arbitration agreement." Simpson, 373 S.C. at 26, 644 S.E.2d at 669.

Applying this analysis, the Simpson Court provided as follow:

> [T]he contract between Simpson and Addy involved a vehicle intended for use as Simpson's primary transportation, which is critically important in modern day society. Applying the factors considered by the Fourth Circuit in analyzing arbitration clauses, we also acknowledge Simpson's claim that she did not possess the business judgment necessary to make her aware of the implications of the arbitration agreement, and that she did not have a lawyer present to provide any assistance in the matter. *But see Munoz*, 343 S.C. 531, 542 S.E.2d 360 (failing to factor in the weaker party's status as a consumer in analyzing an unconscionability claim in an arbitration agreement between a consumer and a lender). Similarly, we note that Simpson's allegation that the contract was "hastily" presented for her signature.

Simpson, 373 S.C. at 26, 644 S.E.2d at 670. The circuit court was correct in its application of the Simpson analysis and its finding that the Wattses had an absence of meaningful choice.

i. There was a Disparity in Bargaining Power and Sophistication of the Parties.

The facts here reasonably support the finding that there was a disparity in bargaining power and the relative sophistication between the parties. When the vehicle was purchased, Ms. Watts was a student at the College of Charleston. ROA, p. 948, ll. 16-20; ROA, p. 888, l. 23 to ROA, p. 889, l. 3. Michael Watts sells garage doors. ROA, p. 896, l. 15 to ROA, p. 897, l. 7. The Wattses did not have an attorney present when they signed the agreement. ROA, p. 1102, ¶ 8. The Plaintiffs were not sophisticated and not business concerns. *See* Simpson, 373 S.C. at 26, 644 S.E.2d at 669 ("In determining whether a contract was 'tainted by an absence of meaning choice' courts should take into account...whether the plaintiff is a substantial business concern...").[1]

As noted by the circuit court, Century BMW is owned by Sonic Automotive, Inc., a large corporation that owns dozens of cars dealerships. *See* http://www.sonicautomotive.com. Sonic Automotive, Inc. drafted the arbitration agreement and has engaged in thousands of transactions where arbitration clauses were used. Sonic is a sophisticated car dealer with years of arbitration clause use. ROA, p. 1044, ll. 7-14; ROA, p. 1033, ll. 9-23.

Notably, Century BMW in their brief, does not argue that there was equal bargaining power and sophistication between the parties. As such, the circuit court's finding on this issue was correct and reasonably supported by the evidence.

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[1]The circuit court correctly rejected Century BMW's misleading attempt to argue that Christine Watts should be classified based on her job in 2008 instead of at the time of her purchase. *See* ROA, p. 5. ("Century BMW argues that Ms. Watts is sophisticated because in 2008 she works as an auditor. However, in 2005, when the vehicle was purchased, Ms. Watts was a student at the College of Charleston.")

ii. The Bargaining Process Was Unfair.

The circuit court's finding that there was unfairness in the bargaining process is reasonably supported by the evidence. Century BMW inconspicuously placed the arbitration agreement within a series of documents that included documents that were required to be signed by law and then had its F&I Manager placed his finger on each document (whether required to be signed by law or not) and say sign here. ROA, p. 1029, l. 14 - ROA, p. 1030, l. 1 (point and sign); ROA, p. 1066, ll.1-16 (documents required to be signed by law); ROA, p. 1067, ll. 10-19; ROA, p. 1074, ll. 13-18; ROA, p. 1074; l. 21 - ROA, p. 1075, l. 2; *see also* ROA, p. 930, ll. 7-13. There was nothing telling the Wattses that the arbitration agreement, unlike the documents required to be signed by law was not mandatory. This procedure indicates that signing all of the documents is mandatory and is indicative of unfairness in the bargaining process. Simpson, 373 S.C. at 25, 644 S.E.2d at 669 ("Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue.").

The Watts stated that there was no discussion of the arbitration agreement. ROA, p. 986, ll. 12-15. Century BMW's General Manager did not know what was discussed with the Wattses but stated that he would "expect" his people to tell the customer that the agreement is "a document providing a remedy for the customer without having to go to court." ROA, p. 1023, l. 8 - ROA, p. 1024, l. 10. The circuit court correctly found that this statement to be "sorely lacking because the arbitration agreement in actuality takes away remedies and statutory rights." ROA, p. 6. The lack of a Century BMW full explanation is further evidence showing the circuit court was correct in finding that there was a fundamental unfairness in the bargaining process.

iii. There Was an Element of Surprise by the Inclusion of the Arbitration Agreement.

The circuit court's finding that there was an element of surprise involved in the inclusion of the arbitration agreement is reasonably supported by the evidence. The circuit court correctly found that none of the signatories of the arbitration agreement (the Wattses nor the F&I manager) understood what they were signing. Neither of the Wattses had ever participated in an arbitration nor had any understanding of arbitration. ROA, p. 901, ll. 19-21; ROA, p. 959; ll. 3-6; ROA, p. 1102, ¶ 7.

Similarly, Century BMW's Rule 30(b)(6) representative as the person most knowledgable on the arbitration agreement testified as follows:

> Q. Okay. Does Courtney James [the F&I Manager] know anymore about how arbitration works than you, or would you say you're better?
>
> MR. BLACK: It's Corey James.
>
> MR. LEWIS: Corey James. Mr. James.
>
> A. I would say neither one of us would be involved in the process or actually been through the process.
>
> Q. Or know anything about it?
>
> A. Not much.
>
> Q. Or what the rules are or what you have to do; do you know any of that?
>
> A. No, sir.

ROA, p. 1031, l. 18 - ROA, p. 1032, l. 6.

Century BMW's General Manager has thirty-two years worth of experience in the car industry, has dealt with the subject arbitration agreement since 2002, and does not understand the arbitration agreement. ROA, p. 1052, ll. 10-12. Similarly, the F&I manager, whom presented the arbitration agreement to the Wattses, does not understand the agreement. ROA, p. 1031, l. 18

- ROA, p. 1032, l. 6. If Century BMW's own people do not understand the agreement, how were the Wattses, whom were in a little cubicle with the F&I Manager with his finger pointing on the document, supposed to understand the agreement?

Even if the arbitration agreement was easily understood, a point which is denied, the explanation the General Manager would "expect" to be given to the customers is misleading and unfair. The General Manager testified as follows:

> Q: Can you sit here and tell me what this form contains?
> A. I'm not an expert, but I can tell you that this is a document providing remedy for the customer without having to go to court.
> Q. If you were to explain it, that's what you would say?
> A. Yes, sir.
> Q. Is there anything else you'd tell them other than it's a remedy for the customer and you don't have to go to court?
> ...
> A. No, sir, I would tell them nothing else.
> Q. Okay. And is that what you expect your employees to tell the -- the people?
> A. They're more informed than I.
> Q Well, is that what you expect them to tell them, at least that?
> A. At least that.
> Q. Okay. Is there anything else you expect to tell -- them to tell them?
> A. No, sir.

ROA, p. 1023, l 9 - 1024, l. 10. The circuit court correctly found that this explanation is misleading because the arbitration agreement takes away rights otherwise available by law. ROA, p. 6. The expected Century BMW explanation makes it sound like arbitration is a great deal for the customer. It appears from this explanation that the customer is not giving up anything but instead gaining an extra remedy, the ability to get relief without going to court.

iv. Use of a Car is a Necessity.

There is also evidence to support the circuit court's finding that use of the car was a necessity to Ms. Watts. The car was purchased to be Ms. Watts's primary source of

transportation and was purchased so that she could get back and forth from work. ROA, p. 998, ll. 11-20. Century BMW argues that the vehicle was not necessity because Christine Watts previously owned a Mitsubishi Montero. As discussed by the circuit court, in its order, the fact that Ms. Watts previously owned another vehicle does not defeat the fact that use of a car is a necessity. ROA, pp. 7-8. The circuit court cited Simpson and stated: "[the plaintiff in Simpson, prior to purchasing the car in that case, owned a 2001 Toyota 4-Runner and the South Carolina Supreme Court expressly found that the car purchased was a necessity. Simpson, 644 S.E.2d at 663. The car purchased by Ms. Watts, like the car purchased in Simpson, was purchased to be her primary source of transportation." ROA, pp. 7-8. Century BMW, in its brief, makes no effort to distinguish Simpson. Thus, the circuit court's finding that use of the car was a necessity for Ms. Watts is supported by the evidence and consistent with the Supreme Court's finding in Simpson.

As discussed above, there was an abundance of evidence on the record which supports the circuit court's finding that there was a "fundamental unfairness" in the bargaining process. Therefore, this finding should not be disturbed on appeal.

C. The Century BMW Arbitration Agreement Contains One-Sided and Oppressive Terms.

The circuit court's findings that the Century BMW arbitration agreement contains oppressive and one-sided terms are supported by the evidence. In analyzing this factor, the circuit court cited the South Carolina Supreme Court in Simpson, which stated:

> The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution. *Carolina Care Plan,* 631 S.C. at 555, 606 S.E.2d at 758. In our opinion, this rule has two applications in the present case. First, this arbitration clause violates statutory law because it prevents Simpson from receiving the mandatory statutory remedies to which she may be entitled in her underlying SCUTPA and Dealers Act claims. Second, unconditionally permitting the weaker party

> to waive these statutory remedies pursuant to an adhesion contract runs contrary to the underlying statutes' very purposes of punishing acts that adversely affect the public interest. Therefore, under the general rule, this provision in the arbitration clause is unenforceable.

Simpson, 373 S.C. at 30, 644 S.E.2d at 671 (citing the "strong public policy notions behind the enactment of the...Dealers Act."). ROA, p. 8. The circuit court correctly applied this analysis here.

i. The Century BMW Arbitration Agreement Contains One-Sided Terms.

The circuit court's finding that the prohibition of multi-plaintiff suits and class actions in the Century BMW arbitration agreement is one-sided is supported by the evidence. In addressing this issue, the circuit court stated:

> Although styled as a mutual prohibition on representative class actions, it is difficult to envision the circumstances on which the provision might negatively impact Century BMW, because car dealers typically do not sue their customers in class action lawsuits. Such a one-sided contract is unconscionable. *See* Finkel v. Cingular Wireless, LLC, 828 NE2d 812, 820-821 (Ill.App. 5 Dist.,2005)("cellular telephone service providers typically do not sue their customers in class action lawsuits. Thus, Cingular's provision barring class arbitration is a one-sided limitation on its customers' ability to seek relief...such a one-sided limitation that could effectively deny plaintiffs their day in court is substantively unconscionable."). *See also* Szetela v. Discover Bank, 97 Cal.App. 4th 1094 (2002)(Holding a similar clause unconscionable and one-sided because "credit card companies typically do not sue their customers in class action lawsuits.").

ROA, p. 9. Century BMW, in its Appellant Brief, does not challenge this finding. This is because the circuit court was correct. The class action waiver does not inhibit Century BMW's rights because Century BMW is not going to bring a class action against its customers. The waiver, instead, is a device designed to insulate Century BMW from liability by preventing it customers from asserting class action and multi-plaintiff cases against it. The circuit court's finding that the class action waiver is one-sided is undisputed by Century BMW and should not

be disturbed on appeal [5]

ii. The Century BMW Arbitration Agreement Contains Oppressive Terms

The circuit court was correct in finding that the arbitration agreement contains oppressive terms that violate public policy and statutory law. The Century BMW arbitration agreement contains oppressive terms. ROA, pp. 8-11. In analyzing this factor, the Simpson court stated:

> The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution. *Carolina Care Plan,* 631 S.C. at 555, 606 S.E.2d at 758. In our opinion, this rule has two applications in the present case. First, this arbitration clause violates statutory law because it prevents Simpson from receiving the mandatory statutory remedies to which she may be entitled in her underlying SCUTPA and Dealers Act claims. Second, unconditionally permitting the weaker party to waive these statutory remedies pursuant to an adhesion contract runs contrary to the underlying statutes' very purposes of punishing acts that adversely affect the public interest. Therefore, under the general rule, this provision in the arbitration clause is unenforceable.

Simpson, 644 S.E.2d at 671(citing the "strong public policy notions behind the enactment of the...Dealers Act.").

The circuit court found that: "the Century BMW arbitration agreement here, like the arbitration agreement in Simpson, attempts to take away Plaintiff Watts's statutory rights." ROA, p. 9. The Dealers Act provides substantive rights to those harmed by violations. S.C. Code Ann. §56-15-110(2) provides:

> (2) When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for benefit of the whole. Including actions for injunctive relief.

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[5]The arbitration agreement is so one-sided that even Century BMW's own lawyer, Brad Martin, refused to sign it when he purchased a vehicle. ROA, p. 1038, ll. 1-19. Mr. Martin is the only customer that the General Manager could name in over 6,000 car purchases without signing the arbitration agreement. ROA, p. 1037, ll. 9-25; ROA, p. 1056, ll. 20-23; ROA, p. 1038, ll. 1-19. If the agreement is so bad that Mr. Martin will not sign it, the Court should not enforce it against Ms. Watts.

S.C. Code Ann. §56-15-110(2) provides statutory rights to plaintiffs including the right to bring a claim on behalf of a group and injunctive relief on behalf of a group. The statute was "[o]bviously enacted...because consumers' remedies at common law were deemed inadequate." *See* Kucharski v. Rick Hendrick Chevrolet, LP, 2002 WL 313860990 (SC Ct. App.2002). As stated by the Supreme Court in Simpson, the purpose behind the Dealers Act is to "punish[ ] acts that adversely affect the public interest." Simpson, 373 S.C. at 30, 644 S.E.2d at 671. The statutory protection given in §56-15-110(2) serves the purposes behind the Dealers Act because it protects consumers and deters dealers from engaging in bad conduct.

The circuit court properly found the Century BMW arbitration agreement's attempted prohibition of group suits prevents Plaintiff Christine Watts from effectively vindicating her statutory rights. ROA, p. 10. S.C. Code Ann. §56-15-110(2) provides a statutory right to bring a claim on behalf of a group. The circuit court noted that: "this protection is necessary because otherwise parties with nominal individual claims, but significant collective claims, would be left with limited avenues for relief and a wrongdoer car dealer with little checks on its abuses of law."[6] ROA, p. 10. This statutory right makes it economical for a car purchaser who has been harmed by violation of the statute to bring claims against a car dealer. The circuit court was correct in finding that Century BMW's attempt to take this right away is violative public policy.

Moreover, the circuit court was correct in finding that "Plaintiff Christine Watts's statutory right, as one harmed Plaintiff, to seek group injunctive relief, when an action is of common or general interest to many persons, cannot be effectively vindicated under the Century

[6]The South Carolina Supreme Court has stated that it would not enforce the type of class action waiver at issue in this case. "[P]reclusion of class-wide or consolidated arbitration in an adhesion contract, even if explicit, undermines principles favoring expeditious and equitable case disposition absent demonstrated prejudice to the drafter of the adhesion contract." Bazzle v. Green Tree Financial Corporation, 351 S.C. 244, 569, S.E.2d 349 (2002) (*R'vd on other grounds*).

BMW arbitration agreement." ROA, p. 10. Century BMW, in its brief, does not dispute that Respondent Christine Watts cannot obtain group injunctive relief under the arbitration agreement. This is contrary to S.C. Code Ann.§56-15-110(2) which is designed so that one person can stop a car dealer from perpetrating wrongdoing against many car purchasers. The potential for a group of plaintiffs to collectively pursue a claim against a car dealer serves as a deterrent to prevent car dealers from engaging in wrongful conduct. The circuit court correctly found that these statutory rights cannot be vindicated under the Century BMW arbitration agreement.[7] ROA, pp. 8-10.

The circuit court's refusal to enforce the Century BMW arbitration agreement is consistent with the South Carolina Supreme Court's statements that they will not enforce this type of arbitration clause. "[P]reclusion of class-wide or consolidated arbitration in an adhesion contract, even if explicit, undermines principles favoring expeditious and equitable case disposition absent demonstrated prejudice to the drafter of the adhesive contract." Bazzle v. Green Tree Financial Corp., 569 S.E.2d 349, 361 (S.C.2002)(*R'vd on other grounds*). Similarly, the circuit court's order is consistent with courts in other jurisdictions which have found similar arbitration agreements to be unenforceable. *See* Tillman v. Commercial Credit Loans, Inc., 655 S.E.2d 362 (N.C.2008); Cooper v. QC Financial Services, Inc., 503 F.Supp2d 1266, 1290 (D.Ariz.,2007); Eagle v. Fred Martin Motor Co., 809 NE2d 1161 (Ohio App. 2004)(concluding provision preventing right to proceed through a class action or as a private attorney general were

[7]Century BMW raises in a footnote the argument that "the Attorney General's Office can seek class-wide equitable relief for any violation of the Dealers Act" in support of the proposition that somehow taking away Christine Watts's statutory rights is permissible. This argument fails for two reasons. First, Century BMW never raised this argument below and it is not proper on appeal. Second, the General Assembly specifically gave individual car purchasers the right to bring the group action and to seek group relief. This specific grant of a statutory right to car purchasers is significant and should not be taken away in this context.

both against public policy and the underlying purpose of the Consumer Sales Practices Act and thus were unenforceable). Lozada v. Dale Baker Oldsmobile, Inc., 91 F. Supp. 2d 1087 (W.D. Mich. 2000)(arbitration clause involving the sale of automobiles providing for waiver by buyer's or right to proceed by way of a class action was substantially unreasonable and unconscionable); State Ex Rel. Dunlap v. Berger, 567 SE2d 265 (W.Va.Ct.App. 2002). Such clauses are unconscionable because they insulate Defendants from significant exposure brought about when otherwise small claims are grouped together.

Century BMW's argument that somehow the South Carolina Supreme Court in Simpson ruled that class action waivers in adhesion contracts are enforceable is wrong. The plaintiff in Simpson did not raise this issue or argue that arbitration agreement was unenforceable due to a class action waiver. Accordingly, this issue was not before the Supreme Court and not decided in the Simpson case. *See* Gathings v. Robertson Brokerage Co., Inc., 295 S.C. 112, 118, 367 S.E.2d 423, 427 (S.C.App.,1988)("Appellant courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.").

The circuit court's findings that the Century BMW arbitration agreement contains oppressive terms, violates statutory law, and public policy are reasonably supported by the evidence. These findings are also consistent with the "strong public policy reasons" behind the enactment of the Dealers Act and consistent with the Dealers Act's purpose of "punishing acts that adversely impact the public interest." Simpson, 373 S.C. at 30, 644 S.E.2d at 671.

For the reasons set forth above, the circuit court's findings that: (A) the Century BMW arbitration agreement is an adhesion contract; (B) the Wattses had an absence of meaningful choice; and (C) that the arbitration agreement contains one-sided and oppressive terms are all

supported by the evidence and should not be disturbed on appeal. Accordingly, the circuit court's order denying Century BMW's motion to compel arbitration should be affirmed.

II. This Facts in this Case are Just Like Simpson and Thus the Circuit Court Was Correct in Holding the Arbitration Agreement to be Unenforceable.

The South Carolina Supreme Court in Simpson v. MSA of Myrtle Beach, 373 S.C. 14, 644 S.E.2d 663 (S.C.2007), found a similar form contract in an automobile transaction to be unconscionable and unenforceable. The facts in this case mirror those in Simpson. Included below is a chart comparing the significant facts in Simpson to the facts in this case.

Simpson Significant Facts	Facts in This Case
The Defendant used a form contract. 373 S.C. at 27, 644 S.E.2d at 669.	The contract here is a form contract. ROA, p. 1044, ll. 7-14.
Vehicle was a necessity because it was for plaintiff's primary source of transportation. 373 S.C. at 27, 644 S.E.2d at 670.	The vehicle here is also a necessity because it was to be Christine Watts's primary source of transportation and was needed to get back and forth from work. ROA, p. 1101, ¶ 3; ROA, p. 998, ll. 11-20.
The plaintiff did not understand the implications of arbitration. 373 S.C. at 27, 644 S.E.2d at 670.	The Wattses had no understanding of arbitration. ROA, p. 901, ll. 19-21; ROA, p. 959, ll. 3-6; ROA, p. 1102, ¶ 7.
The plaintiff did not have a lawyer present when she signed the arbitration agreement. 373 S.C. at 27, 644 S.E.2d at 670.	The Wattses did not have a lawyer present when they signed the arbitration agreement. ROA, p. 990, ll. 7-9; ROA, p. 1102, ¶ 8.
The agreement was hastily presented for plaintiff's signature. 373 S.C. at 27, 644 S.E.2d at 670.	The agreement was hastily presented for the Wattses' signatures. ROA, p. 1101, ¶ 4.
The agreement purported to take away statutory rights under the Dealers Act. 373 S.C. at 30, 644 S.E.2d at 671.	The Century BMW arbitration agreement attempts to take away statutory rights to bring a group action and obtain a group injunctive relief under the Dealers Act. *See* S.C. Code Ann. §56-15-110(2).

The agreement contained text in small font. 373 S.C. at 28, 644 S.E.2d at 670.	The text of the arbitration agreement here is in small font. ROA, p. 1100 and ROA, p. 1106.
The agreement was drafted by a corporate entity who was a superior party. 373 S.C. at 28, 644 S.E.2d at 670.	The agreement was drafted by Sonic Automotive, a multi million dollar corporation. ROA, p. 1044, ll. 7-14. Michael Watts sells garage doors and at the time Ms. Watts signed the agreement she was a 24 year old student. ROA, p. 896, l. 15 - ROA, p. 897, l. 4; ROA, p. 1127; ROA, 948, ll. 14-20. Clearly, Century BMW was the superior party.
The agreement purported to take away rights otherwise available by law. 373 S.C. at 28-30, 644 S.E.2d at 670-671.	The arbitration agreement here attempts to take away statutory rights to bring a group action and obtain a group injunctive relief which are provided in the Dealers Act and otherwise available by law.
The plaintiff believed the agreement was presented on a take-it or leave-it basis. 373 S.C. at 26-27, 644 S.E.2d at 669.	The Wattses were led to believe the arbitration agreement was presented on a take-it or leave-it basis and that they had to sign it to get the car. ROA, p. 933, ll. 10-12; ROA, p. 985, ll. 18-22; ROA, p. 989, ll. 10-18; ROA, p. 990, ll. 2-6; ROA, p. 997, ll. 6-17; ROA, pp. 1101-1102, ¶ 5.

As shown in the above chart, the facts in this case are just like the facts in Simpson. Therefore, the circuit court was correct in finding that the Century BMW arbitration agreement, like the arbitration agreement in Simpson, was unenforceable.[8]

[8]In addition to Simpson, the North Carolina Supreme Court's decision in Tillman v. Commercial Credit Loans, Inc., 655 S.E.2d 362 (N.C.2008) also supports a finding that the arbitration agreement here is unenforceable.

III. The Circuit Court Correctly Followed the Simpson Court and Viewed the Century BMW Arbitration Agreement with "Considerable Skepticism."

Century BMW argues that the circuit court's analyzing the contract with "considerable skepticism" was erroneous and "violate[s] United States Supreme Court's Mandate that State courts place arbitration agreements on equal footing with all other contracts." *See* Century BMW Brief, p. 10. Importantly, the circuit court applied the exact analysis adopted by the South Carolina Supreme Court in Simpson. *See* Simpson v. MSA of Myrtle Beach, 373 S.C. 14, 644 S.E.2d 663 (S.C.2007)(adopting rationale of Ohio Courts in analyzing arbitration agreements by automobile retailers and stating "We...proceed to analyze this contract between a consumer and automobile retailer with 'considerable skepticism'.").

Essentially, Century BMW argues that this Court should reject the South Carolina Supreme Court's analysis in Simpson because it is allegedly inconsistent with the United States Supreme Court precedent and Federal Law. This argument fails. The United States Supreme Court refused to take certiorari over the Simpson case. MSA of Myrtle Beach v. Simpson, 128 S.Ct. 493 (U.S.2007). Additionally, a Federal Court in South Carolina has applied the Simpson court's "considerable skepticism" analysis to another automobile adhesion contracts. *See* Knox v. Joe Gibson's Auto World Inc., 2008 WL 2077361, C.A. No.: 7:07-4020-HMH (May 8, 2008)("In light of the South Carolina Supreme Court's admonition that adhesion contracts between a consumer and an automobile retailer regarding arbitration, such as the one at issue in the instant case, should be analyzed 'with considerable skepticism.' The court finds that the agreement is unconscionable and unenforceable against the plaintiffs.").

Furthermore, the South Carolina Supreme Court's treatment of an adhesion contract between an automobile retailer and a consumer with "considerable skepticism" is not, as Century

BMW argues, inconsistent with United States Supreme Court precedent and Federal Law.[9] The South Carolina Supreme Court is not treating all arbitration agreements with "considerable skepticism." Instead, the "considerable skepticism" analysis only applies to adhesion contract between an automobile retailer and a consumer. Accordingly, arbitration agreements, as a whole, are being placed on equal footing with other contracts and Century BMW's argument fails.

The United States Supreme Court refused to take certiorari over the Simpson case and a Federal Court in South Carolina has applied the considerable skepticism analysis. Thus, Century BMW's argument that the Simpson case's "considerable skepticism" analysis violates United States Court precedent and Federal law should be rejected. This Court should affirm the circuit court's use of the South Carolina Supreme Court's "considerable skepticism" analysis.

IV. The Circuit Court Was Correct in Following the Ruling in Simpson that the Presumption the a Party has Read and Understood a Contract Does Not Mandate Enforcement of All Arbitration Agreements.

Century BMW wrongly argues that the presumption that a party has read and understood[10] an arbitration agreement automatically binds Respondent Christine Watts to arbitration. This exact argument was rejected by the South Carolina Supreme Court in Simpson. The Simpson court stated:

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[9]Additionally, Century BMW's argument that the circuit court's order is inconsistent with the Snowden v. Checkpoint Cashing, 290 F.3d 631 (4th Cir. 2002) is misplaced. The plaintiff in Snowden was not asserting that the arbitration agreement at issue there was unconscionable because it took away statutory right. In this case, the Century BMW arbitration agreement impermissibly seeks to take away Respondent Christine Watt's statutory right under the Dealers Act to bring claims on behalf of a group. As such, the decision in Snowden is not on point.

[10]As discussed in Argument I(B)(ii), p. 16, it is unfair to expect the Wattses to understand the arbitration agreement when Century BMW's General Manager and F&I Manager, with years of experience and whom deal with the arbitration agreement on a regular basis, do not understand the agreement. Accordingly, the circuit court was correct in finding that this presumption does not require arbitration here.

> Moreover, regardless of the general legal presumptions that a party to a contract has read and understood the contract's terms, we also find it necessary to consider the otherwise inconspicuous nature of the arbitration clause in light of its consequences. The loss of the right to a jury trial is an obvious result of arbitration. However, this particular arbitration clause also required Simpson to forego certain remedies that were otherwise required by statute. While certain phrases within other provisions of the additional terms and conditions were printed in all capital letters, the arbitration clause in its entirety was written in the standard small print, and embedded in paragraph ten (10) of sixteen (16) total paragraphs included on the page. Although this Court acknowledges that parties are always free to contract away their rights, we cannot, under the circumstances, ignore the inconspicuous nature of a provision, which was drafted by the superior party, and which functioned to contract away certain significant rights and remedies otherwise available to Simpson by law. Furthermore, and contrary to Addy's argument, the present transaction may be distinguished from that in *Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, 361 S.C. 544, 606 S.E.2d 752 (2004), where both parties were sophisticated business interests in an arms-length negotiation.

Simpson v. MSA of Myrtle Beach, Inc., 373 S.C. 14, 27-28, 644 S.E.2d 663, 670 (S.C.,2007). In its analysis, the Simpson court cited the following factors in deciding that the presumption of reading and understanding does not require arbitration: use of a small font; the inconspicuous nature of the provision; the fact that the agreement was drafted by a superior party; and that the agreement took away significant statutory rights.

All of the factors cited by the Simpson court are present in this case. The Century BMW arbitration agreement contains small font. *See* ROA, p. 2 ("the arbitration agreement uses a small font. . . ."). Century BMW inconspicuously placed the arbitration agreement within a series of documents. *See* ROA, p. 6. ("Century BMW inconspicuously placed the arbitration agreement within a series of documents that included documents that were required to be signed by law and then had its F&I manager point on each document (whether required to be signed by law or not) and said 'sign here'."); *see also* ROA, p. 990, l. 2 - ROA, p. 991, l. 17 (testimony that arbitration agreement was included within a packet of documents with flags on individual documents indicating where to sign). Century BMW drafted the arbitration agreement and is the

superior party.[11] The arbitration agreement attempts to take away important statutory rights, including the right to seek group relief and the ability to obtain group injunctive relief. Thus, the circuit court's ruling that the arbitration agreement was unenforceable, even though the Wattses had an opportunity to read the contract, is consistent with the South Carolina Supreme Court ruling in Simpson. Accordingly, Century BMW's argument that the fact that the Wattses may have had an opportunity to read the arbitration agreement is outcome determinative and mandates arbitration here, should be rejected.

CONCLUSION

For the foregoing reasons, the circuit court's order denying the motion to compel arbitration should be affirmed.

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[11] See detailed discussion in Argument I(B)(i), p. 15.

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_____, 2008

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge

Circuit Court Case No. 2006-CP-02-1230

Heather Herron, Natalie Armstrong, Michael Ritz, Julie Freeman, Christine Watts, Alison Dannert, Michael Blease, Michael Watts, individually and for the benefit of all car buyers who paid "administrative fees" as described below to Defendants, ... **Respondents,**

v.

Century BMW d/b/a Sonic Automotive; Dick Dyer & Associates, Inc.; Galeana Chrysler Plymouth, Inc., a/k/a Galeana Chrysler Jeep, Inc.; J.L.H. Investments LP a/k/a Hendrick Honda; Overland, Inc., d/b/a Land Rover of Columbia; Taylor Toyota a/k/a Taylor Investments, and Toyota of Greenville, Inc.,. . . . . **Defendants,**

of whom Century BMW d/b/a Sonic Automotive is the . . . . . .**Appellant.**

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Rules

Rule 23, SCRCP 18

This is a simple case in which Christine Watts decided she wanted to purchase a luxury BMW convertible from Century BMW. With the active assistance of her father, she negotiated to purchase her 2005 BMW for the specific price of $32,000 00 including any and all taxes, fees or any other charges. [R.p. 1145, Buyer's Order.] Unremarkably, Ms. Watts and her father traveled to the dealership to close the transaction and sign the documents confirming she was purchasing a BMW convertible and was paying the exact price she and her father established in their negotiations. There were no additional fees or charges that suddenly appeared that increased the negotiated price of her convertible. Those documents included a separate and conspicuously titled Arbitration Agreement which both Ms. Watts and her father signed. These uncontested facts have morphed into a series of contradicting claims by the Wattses in order to avoid complying with her contractual obligation to arbitrate any dispute she might have with Century BMW.

The Respondent in her brief, Ms. Watts, does not mention that—consistent with Century BMW policy—the F&I manager never told the Wattses that signing the arbitration agreement was required to purchase a car. It also ignores Ms. Watts's own admission that she had full opportunity to read any and all documents, including the arbitration agreement, but decided not to because she was in a rush to leave the dealership. [R.p. 929, lines 1-14, R.p. 932, lines 13-18, Michael Watts Dep. pp. 50:1-14, 53:13-18; R.p. 979, lines 19-23, R.p. 985, lines 18-22, Christine Watts Dep. pp. 40:19-23, 46:18-22.] These undisputed facts alone demonstrate that Ms. Watts had a meaningful choice in agreeing to arbitrate. Moreover, the agreement is both valid and enforceable under Supreme Court of the United States and South Carolina precedent because Ms. Watts can fully and effectively vindicate her claims in arbitration.

FACTS

Ms. Watts's response to Century BMW's appeal relies on numerous and substantial distortions of the record, including:

- "The Wattses say they were presented with a big packet of documents containing flags indicating where the Wattses were supposed to sign." Pl.'s Br. at 8. However, Mr. Watts actually testified that he was not given a large stack of documents and said nothing about flags. [R.p. 930, lines 4-6, Michael Watts Dep. p. 51:4-6.]

- The arbitration agreement was presented "on a take-it-or-leave-it-basis." Pl.'s Br. at 13. Signing all of the documents was "mandatory." Pl.'s Br. at 17. "The Wattses were led to believe . . . they had to sign [the arbitration agreement] to get the car." Pl.'s Br. at 27. In this case, however, the Wattses were never told they had to sign the arbitration agreement. [R.p. 933, lines 6-9, Michael Watts Dep. p. 54:6-9; R.p. 986, lines 12-19, Christine Watts Dep. p. 47:12-19.] The record shows that Century BMW does not require a customer to sign the arbitration agreement to purchase a vehicle and has in fact had customers not sign the arbitration agreement and still purchase vehicles. [R.p. 933, lines 6-9, Michael Watts Dep. p. 54:6-9; R.p. 986, lines 12-19, Christine Watts Dep. p. 47:12-19; R.p. 1029, line 24 – p. 1030, line 10, R.p. 1093, line 4 – p. 1095, line 5, Bobby Bishop Dep. pp. 22:24-23:10, 86:4-88:5.]

- "The car . . . was needed so that she could get back and forth to work." Pl.'s Br. at 8. In this case, Ms. Watts had a perfectly operable vehicle before purchasing the 2004 BMW Z4 convertible in June 2005. [R.p. 998, line 24 – R.p. 999, line 10, Christine Watts Dep. pp. 59:24-60:10.]

- "The documents were hastily presented." Pl.'s Br. at 8. The actual sworn testimony of the Wattses indicates otherwise. It was the Wattses who were eager to leave the dealership as quickly as possible and the manager put no pressure on them to sign the documents. [R.p. 929, lines 1-14, R.p. 932, lines 13-18, Michael Watts Dep. pp.50:1-14, 53:13-18; R.p. 979, liens 19-23, R.p. 985, lines 18-22, Christine Watts Dep. pp. 40:19-23, 46:18-22.] Ms. Watts's brief cites to her affidavit, rather than the deposition transcripts, because her deposition testimony contradicts her affidavit and confirms that any rush to sign the documents was self-imposed. *Compare* R.p. 1101, ¶4, Christine Watts Affid. *with* R.p. 929, lines 1-14, R.p. 932, lines 13-18, Michael Watts Dep. pp. 50:1-14, 53:13-18; R.p. 979, lines 19-23, R.p. 985, lines 18-22, Christine Watts Dep. pp. 40:19-23, 46:18-22.

- The Plaintiffs can be dismissed as a "twenty-four year old" girl and a "garage door salesman." See, Pl.'s Br. at 8. The facts are that (1) the Respondent Christine Watts is a highly trained auditor with a bachelor's and master's degree in accounting, and (2) her father, Michael Watts, is a sales manager with prior

experience managing forty-five employees. [R.p. 948, line 10 - R.p. 953, line 2, Christine Watts Dep. pp. 9:10 – 14:2; R.p. 894, line 19 - R.p. 897, line 1 Michael Watts Dep. pp. 15:19-18:1.]

- The General Manager of Century BMW's statement that arbitration is a method to resolve disputes without having to go to court is somehow misleading. *See* Pl.'s Br. at 10. It is true that arbitration *is* a method of resolving disputes without having to go to court. In this matter, the arbitration agreement waives no statutory or common law remedies. Moreover, whatever the General Manager might hypothetically say to other customers has no relevance to this case or to the Wattses who claim that dealership employees provided no explanation—misleading or otherwise—of the arbitration agreement to them.

These distortions notwithstanding, the Respondent does not dispute several significant and fundamental facts:

(1) she was never told that signing the arbitration agreement was required to purchase a car [R.p. 986, lines 12-19, Christine Watts Dep. p. 47:12-19; R.p. 933, lines 6-9, Michael Watts Dep. p. 54:6-9];

(2) she was not pressured to sign the agreement, [R.p. 929, line 13 – R.p. 932, line 17, Michael Watts Dep. pp.50:13-51:17; R.p. 983, lines 17-19, Christine Watts Dep. p. 44:17-19];

(3) she had full opportunity to read the agreement, [R.p. 929, lines 1-4, R.p. 932, line 13- R.p. 934, line 4, Michael Watts Dep. pp. 50:1-14, 53:13-55:4; R.p. 979, lines 19-23, R.p. 983, lines 17-19, R.p. 985, lines 18-22, Christine Watts Dep. pp. 40:19-23, 44:17-19, 46:18-22];

(4) she was the individual who decided to be in a rush to leave the dealership, [R.p. 929, line 1-14; R.p. 932, lines 13-18, Michael Watts Dep. pp. 50:1-14, 53:13-18; R.p. 979, lines 19-23, R.p. 985, lines 18-22, Christine Watts Dep. pp. 40:19-23, 46:18-22];

(5) she claims to have not read *any* of the six documents she signed, [R.p. 982, lines 16-22, R.p. 983, lines 14-19, Christine Watts Dep. p. 43:16-22, 44:14-19]; and

(6) Century BMW—as a matter of practice and policy—does not require a customer to sign the arbitration agreement to purchase a vehicle. [R.p. 1029, line 24-R.p. 1030, line 10; R.p. 1093, line 4-R.p. 1095, line 5, Bobby Bishop Dep. pp. 22:24-23:10, 86:4-88:5.]

that the agreement itself is conspicuous—in stark contrast to the agreement in *Simpson*. The arbitration clause in *Simpson* was a single-paragraph arbitration *clause* on the back of a form buyer's order (embedded within sixteen other clauses) that Simpson did not initial or otherwise independently sign. Here, Ms. Watts signed a stand-alone *agreement*, conspicuously entitled "**ARBITRATION AGREEMENT**." [R.p. 1100, Arbitration Agreement.] The full-page agreement required both of the Wattses to indicate their assent. [R.p. 1100, Arbitration Agreement.] Moreover, several provisions are in all capital letters, and are clearly written: "IF A DISPUTE IS ARBITRATED, YOU AND WE WILL EACH GIVE UP OUR RIGHT TO A TRIAL BY THE COURT OR BY A JURY." [R.p. 1100, Arbitration Agreement.] The final sentence of the agreement, which is in bold and all capital letters, states: "**BY SIGNING BELOW, THE PARTIES ACKNOWLEDGE THAT THEY HAVE READ AND AGREE TO THE TERMS OF THIS ARBITRATION AGREEMENT.**" [R.p. 1100, Arbitration Agreement.] Mr. Watts admits that the document is easily identifiable as an arbitration agreement and that it would not have been difficult to read the entire agreement. [R.p. 930, line 14-R.p. 931, line 21, Michael Watts Dep. pp. 51:14-52:21.] Thus, unlike in *Simpson*, the agreement here was conspicuous and there was no excuse or legal basis for the Wattses' failure to read it.

As long as the Wattses had the ability and opportunity to read the arbitration agreement—which they do not contest—South Carolina law binds them to their signatures. Thus, the circuit court erred by denying the motion to compel arbitration. No arbitration agreement would be enforceable if a party can later claim they did not take the time to read the agreement they signed. This result would require the Court to reverse

prior court rulings such as the *Lackey* decision. *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 498 S.E.2d 898 (S.C. Ct. App. 1998).

III. The *Simpson* Decision is Distinguishable Because the Respondent Did Not Lack a Meaningful Choice and the Agreement Did Not Contain Oppressive and One-sided Terms.

The *Simpson* case also supports the propositions that the Respondent had a meaningful choice in signing the agreement and that the agreement does not contain any oppressive and one-sided terms. Ms. Watts's argument that "the facts in this case mirror those in *Simpson,*" Pl.'s Brief at 26, is in substantial conflict with the facts in this case. Although plaintiffs' counsel had Ms. Watts sign an affidavit a week after the *Simpson* decision parroting (virtually verbatim) the language of that decision and claiming that exactly what happened in the *Simpson* case had also miraculously happened to her, the depositions taken in this matter demonstrated that the Wattses' transaction was nothing like the *Simpson* transaction. Consider the following examples:

MEANINGFUL CHOICE	
***Simpson* Facts**	**Watts Facts**
The clause is a contract of adhesion; "[n]either party disputes that the contract . . . was an adhesion contract." 373 S.C. at 27.	**The agreement is not a contract of adhesion;** the F&I manager never told the Wattses that the arbitration agreement was mandatory. [R.p. 986, lines 16-19, Christine Watts Dep. p. 47:16-19; R.p. 933, lines 6-9, Michael Watts Dep. p. 54:6-9.] Century BMW permits customers to buy cars even if they refuse to sign the agreement. [R.p. 1093, line 4-R.p. 1095, line 5, Bishop Dep. p. 22:24-23:10; 86:4-88:5.]
The contract was **presented on a take-it-or-leave-it basis.** *Id.* at 26-27.	The agreement was **not presented on a take-it-or-leave-it basis** because the F&I manager never said they had to sign it. [R.p. 986, lines 16-19, Christine Watts Dep. p. 47:16-19; R.p. 933, lines 6-9, Michael Watts Dep. p. 54:6-9.]

Simpson **"did not possess the business judgment** necessary to make her aware of the implications of the arbitration agreement." *Id.* at 27.	Ms. Watts is an **auditor, trained to examine documents carefully, with a master's degree in accounting.** [R.p. 948, line 10-R.p. 953, lines 2; R.p. 999, line 11-R.p. 1000, line 7, Christine Watts Dep. pp. 9:10-14:2, 60:11-61:7.]
Simpson apparently was **unaccompanied** during her purchase. *Id.*	Ms. Watts was **accompanied by her father,** who had purchased twelve vehicles from dealerships in his lifetime. [R.p. 985, line 1-R.p., 900, line 2, Michael Watts Dep. pp. 16:1-21:2.]
The contract was **"hastily" presented** for her signature. *Id.*	**The Wattses were eager to leave the dealership as soon as possible** and any haste to sign the documents was solely caused by their self-imposed rush. [R.p. 929, line 1-14; R.p. 932, lines 13-18, Michael Watts Dep. pp. 50:1-14, 53:13-18; R.p. 979, lines 19-23, R.p. 985, lines 18-22, Christine Watts Dep. pp. 40:19-23, 46:18-22.]
The vehicle was a necessity. *Id.*	Ms. Watts admits **she did not need to buy a luxury convertible** and she could have continued driving her Mitsubishi Montero to and from work. [R.p. 998, line 24-R.p. 999, line 10, Christine Watts Dep. pp. 59:24-60:10.]
The clause was inconspicuous; it is written entirely in small print and embedded within fifteen other paragraphs. *Id.* at 27-28.	**The stand-alone agreement was conspicuous** as Mr. Watts admits the, with portions in all capital letters and bolded, is readily identifiable as an arbitration agreement and is perfectly readable. [R.p. 930, line 14-R.p. 931, line 21, Michael Watts Dep. pp. 51:14-52:21.]

NO OPPRESSIVE AND ONE-SIDED TERMS

Simpson Facts	Watts Facts
The clause limits statutory remedies, precluding "punitive, exemplary, double, or treble damages." *Id.* at 28-29.	**The agreement does not limit statutory remedies** and provides the arbitrator with the authority to award fees, costs, injunctive and other equitable relief, and any damages allowed under governing law. [R.p. 1100, Arbitration Agreement.]

The clause violates the Dealers Act, preventing "Simpson from receiving mandatory statutory remedies to which she may be entitled . . . [under] SCUTPA and [the] Dealers Act." *Id.* at 29-30.	**The agreement does not violate the Dealers Act** as the Wattses are not prevented from receiving any statutory remedies under the SC Dealers Act or any other statute. [R.p. 1100, Arbitration Agreement.]
The clause does not address attorneys' fees and costs. *Id.* at 20.	**Under the agreement, attorneys' fees and costs are recoverable** in accordance with applicable law. [R.p. 1100, Arbitration Agreement.]
The clause lacks mutuality of remedy because the dealer is not required to submit certain claims to arbitration, even though the clause mandates arbitration of all customer claims. *Id.* at 31.	**The agreement includes mutuality of remedy** as either party can demand arbitration of any dispute and no judicial fora are reserved for the Dealer. [R.p. 1100, Arbitration Agreement].
The clause provides no right to forego arbitration. *Id.* at 20.	**The agreement provides a right to forego arbitration** by bringing an action in small claims court. [R.p. 1100, Arbitration Agreement]
The filing fees are paid by the party initiating arbitration. *Id.* at 20.	If a customer initiates the action, the **dealer pays any amount in excess of what the customer would have paid to file the case in court.** [R.p. 1100, Arbitration Agreement.] The agreement is also subject to the AAA rules, which require the dealer to pay any arbitrator's fees over $125. [R.p. 665, AAA rules.]
The clause designates a mandatory arbitration location. *Id.* at 20.	**The customer decides the locale of the arbitration** as the customer can choose between the federal district where she lives or the federal district where she purchased the vehicle. [R.p. 1100, Arbitration Agreement.]
The dealer's judicial remedies supersede the consumer's arbitral remedies as certain Dealer remedies are not stayed pending the outcome of arbitration. *Id* at 31-32.	**A customer's arbitral remedies are not superseded** as all remedies are stayed pending the outcome of arbitration. [R.p. 1100, Arbitration Agreement.]

A. Ms. Watts and her father did not lack a meaningful choice in agreeing to arbitrate.

The circuit court's finding that Ms. Watts lacked a meaningful choice is premised on a distortion of the record. Ms. Watts does not dispute that the agreement itself was conspicuous. Nor can she and her father plausibly claim that the agreement was "hastily" presented to them as they both admit they were eager to leave the dealership as quickly as possible. Similarly, any supposed surprise by the inclusion the arbitration agreement in the documents they signed is solely attributable to their personal decision to rush to leave the dealership. Ms. Watts made her own decision not to read *any* of the documents she was presented. The agreement itself is clearly entitled "**ARBITRATION AGREEMENT**." Even a cursory review of the document would have notified both of them of the nature of the agreement they each independently signed. Moreover, the Wattses were not ignorant unsophisticated consumers. At the time of her purchase, Ms. Watts was about to attain a master's degree in accounting and was about to begin a career founded upon the careful examination of documents. In addition, her father had (1) purchased nearly a dozen vehicles from other dealerships, (2) they negotiated below the sticker price of the vehicle, (3) refused all additional product enhancements, and (4) obtained outside financing.

Instead, Ms. Watts now relies heavily on her claim that the agreement was presented on a take-it-or-leave-it basis, and therefore, constituted a contract of adhesion. *See* Pl.'s Br. at 13. The Respondent reaches this unfounded and contorted conclusion by avoiding and misconstruing the testimony from the depositions.

The arbitration agreement was *not* presented on a "take it or leave it basis." All three depositions establish that signing the arbitration agreement was not required to

complete the deal. The Wattses admit that no one ever told them they were required to sign the arbitration agreement. [R.p. 986, lines 12-19, Christine Watts Dep. p. 47:12-19; R.p. 933. lines 6-9, Michael Watts Dep. p. 54:6-9.] They point to no statement or affirmative action whatsoever demonstrating that their signatures were required or establishing that Century BMW was unwilling to proceed with her purchase if she did not sign the agreement. The circuit court's only evidentiary support for its finding appears in a footnote in which the Order notes Ms. Watts's ambiguous, unsupported allegation that she subjectively believed they were required to sign the arbitration agreement, without any articulation of **how** she came to believe that when she and her father, who had purchased a dozen vehicles in his lifetime, did not take the time to ask about the arbitration agreement or any document. [R.p. 4, Order p. 4 fn.1.] The record simply contains no evidence that the agreement was mandatory. Rather, it shows that (1) the F&I manager never said the arbitration agreement was required, (2) the Wattses did not ask any questions about the arbitration agreement, (3) the Wattses did not voice any objections to the arbitration agreement, (4) the Wattses were in a rush to leave the dealership as quickly as possible, (5) Century BMW's policy is that the arbitration agreement is not mandatory, and (6) Century BMW has allowed customers not to sign the agreement and still purchase vehicles.[2]

Even if credited, Ms. Watts's testimony that it was her subjective belief that she "had to sign everything" to purchase the car does not advance her claim that the agreement she signed should not be enforced. Reliance on Ms. Watts's subjective

[2] The record also shows that Ms. Watts and her father refused to purchase any additional warranties and service contracts for the vehicle, further indicating they had meaningful choice in the transaction. [R.p. 978, line 15-R.p. 981, line 18, Christine Watts Dep. pp. 39:15-42:18; R.p. 920, line 3-R.p. 924, line 16, Michael Watts Dep. pp. 41:3-45:16]

belief—over the objective evidence that the agreement was not required to complete the transaction—belies both state and nationwide jurisprudence regarding contacts of adhesion. All of the cases in Ms. Watts's Initial Brief that analyze whether a contract is adhesive utilize objective evidence, not self-serving subjective beliefs.[3] In *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 367 (N.C. 2008) (cited in Pl.'s Br. at 24, 27), the court relied on defendant's policy that it would not make a loan if the agreement did not include an arbitration agreement. Likewise, in *Cooper v. QC Fin. Servs., Inc.*, 503 F. Supp. 2d 1266, 1277 (D. Ariz. 2007) (cited in Pl.'s Br. at 24), the staff "represented to Plaintiff that she was required to sign the agreements containing the arbitration provision in order to accomplish to loan transaction." Additionally in *Simpson*, 373 S.C. at 27 (cited in Pl.'s Br. at 20-30), the defendant did not dispute that the arbitration agreement was presented on a take-it-or-leave-it basis. In fact, the Respondent fails to provide a single case in which a court relies on the subjective impressions of a customer over the actual, stated policy of the dealership in determining whether an arbitration agreement is an adhesion contract. Here, unlike *Tillman, Cooper, Simpson,* and *Woods*, the objective facts demonstrate that the agreement was never presented on a take-it-or-leave-it basis.[4]

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[3] In *Woods v. QC Fin. Servs., Inc.*, Case No. 06-CC-004072-V-CV, at *8 (Mo. Cir. Ct. Dec. 31, 2007), which Ms. Watts cited in her circuit court brief the court emphasized that "courts should **not** look to the subjective understanding of individual consumers" but should apply an "objective test." [R.p. 503, Plaintiff's Second Supp. Memo pp. 8-9] (emphasis added). Ms. Watts conveniently decided not to cite *Woods* in her appellate brief.

[4] For the purpose of argument only, even if an arbitration agreement were deemed to be a contract of adhesion, the South Carolina courts have addressed this position of the Respondent and held that a contract of adhesion is enforceable. In *Lackey v. Green Tree Financial Corp*, the appellate court held that finding a contract was an adhesion contract does not render the contract unenforceable. *Lackey v. Green Tree Financial Corp*, 330

Therefore, the record objectively demonstrates that the arbitration agreement was not mandatory, and the Respondent did not lack a meaningful choice when they signed the agreement.

B. Ms. Watts's arbitration agreement does not contain oppressive terms.

The only provision that the circuit court found oppressive—the class action waiver—has been upheld in the majority of jurisdictions addressing such provisions, including the only two decisions with binding authority on this Court. Consistent with those cases, the agreement is enforceable because the Respondent is able to vindicate effectively her claims in arbitration.

1. The majority of jurisdictions addressing arbitration agreements with class action waivers—and the only two decisions with binding authority on this Court—have upheld such provisions.

Supreme Court of the United States and South Carolina Supreme Court precedent recognize that class action waivers are enforceable. The Respondent does not dispute that the great weight of authority is that class action waivers are reasonable and enforceable. *See, e.g., Gay v. Creditinform*, 511 F.3d 369 (3rd Cir. Dec. 21, 2007); *Davidson v. Cingular*, 2007 WL 896349, No. 2:06CV00133-WRW (E.D. Ark. 2007); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 878 (11th Cir. 2005), *cert. denied* 126 S. Ct. 1457 (2006).[5] The fact that certain litigation devices—including

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S.C. 388, 396, 498 S.E.2d 898, 902 (S.C. App. 1998) (the Court ruled that the conclusion that the arbitration agreements "are adhesion contracts does not render them unenforceable.")

[5] *See also Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) (precluding class arbitration "does not leave the plaintiffs without remedies"); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003); *Johnson v. West*

representative actions—may not be available in an arbitration "is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition' [-] characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims." *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 US 20, 31 (1991)); *see also Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1350 (11th Cir. 2005). Indeed, had Ms. Watts abided by her agreement to arbitrate, it is almost a certainty that her claim would already have been arbitrated and resolved.

It is significant that the Respondent does not dispute that the only two decisions with binding authority on this Court that addressed arbitration agreements with class action waivers did not find them unconscionable. First, Ms. Watts does not contest that the Supreme Court of the United States's decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), compels the conclusion that it views class action waivers as enforceable.[6] There, the Court held that it was for an arbitrator to determine whether the arbitration clause at issue precluded class-wide arbitration. *Id.* at 454. By permitting that arbitrator to decide whether the clause prevented class-wide arbitration, the Supreme Court recognized that class preclusion was permissible. If class preclusion were per se

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Suburban Bank, 225 F.3d 366, 374 (3d Cir. 2000); *Champ v. Siegel Trading Co.*, 55 F.3d 269, 277 (7th Cir. 1995); *Delta Funding Corp. v. Harris*, 189 N.J. 28 (2006); *Edwards v Blockbuster, Inc.*, 400 F. Supp. 2d 1305, 1309 (E.D. Okla. 2005) ("Such provisions are a common feature of consumer arbitration agreements, and numerous courts have recognized that they are valid and fully enforceable."); *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001) ("[A]rbitration clauses are not unenforceable simply because they might render a class action unavailable.").

[6] Ironically, Ms. Watts ignores U.S. Supreme Court *Green Tree Financial* decision in her brief, but relies on dicta from the state court decision that the U.S. Supreme Court vacated. Pl. Br. at 24.

invalid, then the U.S. Supreme Court would have just said so and not directed the arbitrator to independently determine whether the agreement allowed for class actions or not. *See also Kinkel v. Cingular*, 857 N.E.2d 250, 262-63 (Ill. 2006) ("The Court's holding in *Green Tree* . . . suggest[s] that an arbitration agreement expressly waiving the ability to arbitrate class claims is enforceable.").

Second, the arbitration clause in the *Simpson* case contained a class action waiver, but the South Carolina Supreme Court did not find it unconscionable, noting that the arbitration clause "contained a total of three unconscionable provisions," none of which included the requirement for individual treatment of claims. *Simpson*, 373 S.C. at 35 n.9, 644 S.E.2d at 674. The Respondent argues now that *Simpson* is unavailing because allegedly Simpson did not claim that the class action waiver was unenforceable. Pl. Br. at 25. The *Simpson* Court stressed throughout its decision, however, that it would not enforce *any* provision that "is violative of policy, statutory law, or provisions of the Constitution." *Id.* at 33, 644 S.E.2d at 673. Consistent with this admonition, the Court found the arbitration clause violated the Magnuson-Moss Warrant Act ("MMWA"), even though Simpson's underlying claims alleged no violation of the MMWA. *See* 15 U.S.C. § 2301 *et seq.* The Court found Simpson's failure to bring a claim under the MMWA "irrelevant" to its conclusion that the clause was unenforceable under the MMWA "as a matter of public policy." *Id.* Likewise, if the provision precluding representative actions violated the Dealers Act or public policy, the Court—regardless of Simpson's specific claims—would have found it unconscionable in the decision refusing to enforce the arbitration agreement presented for review.

2. Ms. Watts can effectively vindicate her cause of action in arbitration.

The circuit court's finding that Ms. Watts cannot effectively vindicate her claims in arbitration (1) ignores the terms of the agreement, (2) transforms the ability to pursue a class action into a non-waivable right, and (3) disregards Supreme Court of the United States precedent.

a. The terms of the agreement establish that Ms. Watts can effectively vindicate her rights in arbitration.

The preclusion of representative actions does not prevent the Respondent from effectively vindicating her rights under the Dealers Act or other statutes. Federal and South Carolina courts unanimously hold that arbitration is permissible as long as the litigant can "effectively" vindicate his or her cause of action in arbitration. *See, e.g., Green Tree Fin. Corp. v. Randolph*, 531 U.S. 70 (2000); *Munoz v. GreenTree Fin.*, 343 S.C. 531 (2001). This does not mean that every right must be available in arbitration. It is perfectly permissible—and expected—that certain rights will not transfer to arbitration. *See Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 US 20, 31 (1991)); *Simpson*, 373 S.C. at 28. Here, the Respondent conflates *effectively* vindicating her rights with vindicating all of her potential rights. Despite being able to arbitrate inexpensively and pursue all applicable relief in arbitration available under the law Ms. Watts argues her inability to bring a class action—in and of itself—invalidates the entire arbitration agreement she decided not to read before she signed it. [R.p. 1100, Arbitration Agreement.]

Rather than ruling that every right transfers to arbitration, courts examining whether a party can "effectively" vindicate his/her rights focus on the litigant's ability to

receive sufficient remedies in arbitration. Ms. Watts does not dispute that in the minority of courts that have found class action waivers invalid, typically the arbitration agreement removed some remedies, such as attorneys' fee or certain damages. *See, e.g., Dale v. Comcast*, 498 F.3d 1216 (11th Cir. 2007) (distinguishing Eleventh Circuit cases upholding class action waivers on the basis that the plaintiffs in those cases could recover attorneys' fees and costs); *Jenkins v. First American Cash Advance of Ga., LLC*, 400 F.3d 868 (11th Cir. 2005) (arbitration agreement permitted consumers to vindicate their statutory rights because it expressly permitted consumers to recover attorneys' fees and costs); *Whitney v. Alltel Commc'ns, Inc.*, 173 S.W.3d 300, 313-14 (Mo. App 2005) (arbitration clause required customers to bear the costs of arbitration and prohibited an award of incidental, consequential or exemplary damages, or attorney fees).

In this case, the arbitration agreement—on its face—does not limit Ms. Watts's remedies. It unambiguously authorizes an arbitrator to award "those damages or other relief allowed by [the] governing law," including "fees, costs, injunctive or equitable relief in accordance with this Agreement and applicable law." [R.p. 1100, Arbitration Agreement.] The agreement also authorizes any award of attorneys' fees and costs that the applicable law permits. [R.p. 1100, Arbitration Agreement.] Given this broad ability to seek and receive all permissible remedies and recoup attorneys' fees and costs, the Respondent can effectively vindicate her claims in arbitration.

b. Ms. Watts has not established that her alleged class action right is non-waivable.

By focusing her unconscionability argument exclusively on the class action waiver, which the *Simpson* decision did not disturb, the Respondent is now attempting to transform her purported ability to pursue a class action into a non-waivable right. It is

axiomatic that parties are generally free to contract away their rights. *See, e.g., Simpson*, 373 S C. at 28, 644 S.E.2d at 670. As a result, a party claiming a right is non-waivable bears the burden of proving that the legislature intended to preclude parties from bargaining away that right. *See Randolph v. GreenTree Fin.*, 244 F.3d 814, 817 (11th Cir. 2001). In *Randolph*, the Eleventh Circuit found that while class actions were an "important means of remedying violation of the [Truth in Lending Act] . . . there exists a difference between the availability of the class action tool, and possessing a blanket right to that tool under any circumstances. An intent to create such a 'blanket' right, a non-waivable right, to litigate by class action cannot be gleaned from the text and the legislative history of the [Act.]" *Id.* Other courts have similarly found that parties are free to waive their class action right absent clear evidence that the legislature intended to confer a non-waivable right. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Johnson v. West Suburban Bank*, 225 F.3d 366 (3rd Cir. 2000); *Gipson v. Cross Country Bank*, 293 F.Supp.2d 1251 (M.D. Ala. 2003).

In this case, the Respondent has not provided this Court with a scintilla of evidence or a single case demonstrating that the South Carolina legislature intended to preclude parties from bargaining or contracting to limit their right to bring a representative action under the Dealers Act. To the contrary, the pre-Rule 23, SCRCP, subsection is permissible—not mandatory—as it provides that a party "may" sue "for the benefit of the whole." S.C. Code Ann. § 56-15-110(2). The legislature merely provided litigants with a potential additional option when pursuing a cause of action under Section 56-15-110, without prohibiting waiver thereof and without exempting a person or party from any other requirements that must be met to serve in a representative class action

capacity. Even without that option, the Respondent is still fully capable—through Section 56-15-110(1)—of vindicating her available rights under the South Carolina Auto Dealers Act. *See, e.g.*, S.C. Code Ann. § 56-15-10 *et seq.*

c. The United States Supreme Court has already rejected the position now proffered by Ms. Watts.

In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991), the Supreme Court of the United States addressed—and rejected—Ms. Watts's argument now before this Court to avoid arbitration. There, the Court denied Plaintiffs' claim that an arbitration could not effectively vindicate their rights under the Age Discrimination in Employment Act ("ADEA") because the arbitration procedures did not provide for class actions and broad equitable relief. *Id.* First, the Court held that arbitrators have the power to fashion equitable relief and the applicable arbitration rule did not restrict the types of relief an arbitrator could award, including equitable relief. *Id.* Second, the Court noted that although the ADEA provides for the possibility of bringing a collective action, it did not make that right mandatory. *Id.* Finally, the Court found it significant that the arbitration agreement did not preclude the Equal Employment Opportunity Commission from bringing actions seeking class-wide equitable relief. *Id.*

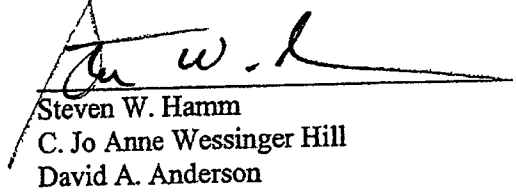
The same considerations apply in this case. First, not only do arbitrators have the power to fashion equitable relief, but Ms. Watts's agreement, on its face, provides for all relief *including equitable relief.* [R.p. 1100, Arbitration Agreement.] Second, that the Dealers Act provides for the possibility of collective action does not make the right to bring a class action under the Dealers Act a non-waivable right. Finally, the South Carolina Attorney General's office is specifically authorized to seek class-wide equitable relief for any violations of the Dealers Act. S.C. Code Ann. § 56-15-40.

Therefore, pursuant to the express terms of the arbitration agreement signed by Christine and Michael Watts as well as the rulings of the Supreme Court of the United States and South Carolina precedent, this Court should reverse the circuit court and find that the Respondent can effectively vindicate her rights in arbitration and direct the lower court to issue an Order granting the Appellant's Motion to Compel Arbitration.

CONCLUSION

For the reasons set forth above, Century BMW respectfully requests that this Court reverse the circuit court's Order and direct the circuit court to enter an order compelling arbitration of Respondent's claims against Century BMW in accordance with the terms of the arbitration agreement and dismissing her claims currently pending in the circuit court.

Respectfully submitted,



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October 6, 2008
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

MAY 03 2010

S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge

Circuit Court Case No. 2006-CP-02-1230

Heather Herron, Natalie Armstrong, Michael Ritz, Julie Freeman, Christine Watts, Alison Dannert, Michael Blease, Michael Watts, individually and for the benefit of all car buyers who paid "administrative fees" as described below to Defendants, ... **Respondents,**

v.

Century BMW d/b/a Sonic Automotive; Dick Dyer & Associates, Inc.; Galeana Chrysler Plymouth, Inc., a/k/a Galeana Chrysler Jeep, Inc.; J.L.H. Investments LP a/k/a Hendrick Honda; Overland, Inc., d/b/a Land Rover of Columbia; Taylor Toyota a/k/a Taylor Investments, and Toyota of Greenville, Inc.,. . . . . **Defendants,**

of which Century BMW d/b/a Sonic Automotive is the . . . . . **Appellant.**

APPELLANT'S PETITION FOR REHEARING PURSUANT TO RULE 221, SCACR

Re: Opinion 26805
Heard January 20, 2010 – Filed April 19, 2010

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Pursuant to Rule 221, SCACR, Appellant Century BMW d/b/a Sonic Automotive, whose true name is Sonic Automotive 2752 Laurens Rd., Greenville, Inc. d/b/a Century BMW ("Century BMW"), hereby respectfully moves for reconsideration of this Court's April 19, 2010 decision (Opinion No. 26805) affirming in result the trial court's order denying Century BMW's motion to compel arbitration.

INTRODUCTION

Eight days after this Court's April 19th Opinion, the Supreme Court of the United States decided *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, No. 08-1198, --- U.S. ----, 2010 WL 1655826 (April, 27, 2010), which changed the legal landscape governing Century BMW's appeal. This Court held that Century BMW could not arbitrate unless it did so as part of a class arbitration. *Stolt-Nielsen*, however, holds that the Federal Arbitration Act ("FAA") requires individual – and not class – arbitration unless a party has *agreed* to class arbitration. Century BMW never agreed to class arbitration. To the contrary, the parties expressly agreed not to arbitrate as a class. Requiring Century BMW to arbitrate in a class arbitration—or not at all—violates the FAA as announced in *Stolt-Nielsen.* The Court, therefore, should withdraw its opinion, reverse the Circuit Court, and remand with instructions to compel Ms. Watts to arbitrate her claim individually.

Even were it not for the intervening *Stolt-Nielsen* opinion, this Court should reconsider its opinion. The Court found that the agreement's class action waiver was unenforceable because the South Carolina Legislature intended the Dealers Act to provide a non-waivable right to bring a collective action under the Act. *Herron v. Century BMW*, No. 26805, --- S.E.2d ----, 2010 WL 1541297 (S.C. Apr. 19, 2010). Ms. Watts never cited the statutory provision upon which the Court rested its opinion (S.C. Code § 56-15-130) and, therefore, Century BMW never had a reason to discuss it. The text of the Dealers Act and the legislative history of the collective

action provision demonstrate that the legislature did not intend any collective action right to be non-waivable. Moreover, the Court's rationale was limited to the Dealers Act; as Ms. Watts's second and third causes of action do not arise under the Dealers Act, even under the Court's reasoning, the Court should have compelled individual arbitration of Counts II and III.

BACKGROUND

On October 31, 2006, Respondent Christine Watts, along with the other plaintiffs below, brought this lawsuit as a representative action against hundreds of South Carolina car dealerships, alleging that in connection with her purchase of a vehicle, Century BMW impermissibly charged her an administrative fee. *See* Am. Compl. ¶¶ 384-85.

On December 29, 2006, pursuant to the FAA and the arbitration agreement that Ms. Watts executed, Century BMW moved to compel arbitration of Ms. Watts's claims and to dismiss this action. The arbitration agreement included a provision in which the parties waived "their right to bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration." [R.p. 1100, Arbitration Agreement.] On March 10, 2008, Judge Early denied Century BMW's Motion to Compel Arbitration of Ms. Watts's claims on the ground that the arbitration agreement was unconscionable. Century BMW timely appealed.

This Court subsequently certified Century BMW's appeal for review on July 6, 2009. After hearing oral argument, the Court on April 19, 2010, affirmed in result the trial court's order. The Court held that the arbitration agreement was not unconscionable, but held that the provision precluding class actions was unenforceable because, according to the Court, language in the Dealers Act created a non-waivable right to bring a class action suit.

ARGUMENT

I. THIS COURT'S OPINION IS INCONSISTENT WITH THE SUPREME COURT OF THE UNITED STATES'S RECENT DECISION IN *STOLT-NIELSEN S.A. V. ANIMALFEEDS INTERNATIONAL CORP.*

A. *Stolt-Nielsen S.A. v. Animalfeeds International Corp.* Holds that the FAA Precludes Class Arbitration Absent An Agreement To Do So.

This Court held that the Dealers Act requires parties to submit to class arbitration even if they have agreed otherwise. In *Stolt-Nielsen*, the Supreme Court of the United States held that the FAA[1] embodies a federal policy precisely to the contrary – precluding class arbitration unless the parties affirmatively agreed to arbitrate on a class basis. The FAA clearly preempts South Carolina law, as this Court construed it. *See, e.g, Toler's Cove Homeowners Ass'n, Inc. v Trident Constr. Co.*, 355 S.C. 605, 611, 586 S.E.2d 581 (S.C. 2003) ("the FAA will preempt any state law that completely invalidates the parties' agreement to arbitrate"); *Blanton v. Stathos*, 351 S.C. 534, 539, 570 S.E.2d 565 (S.C. App. 2002) ("The FAA preempts state laws that invalidate the parties' agreement to arbitrate."); *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 400, 540 S.E.2d 864 (S.C. App. 2000) ("FAA preempts conflicting state arbitration law").

In *Stolt-Nielsen*, plaintiffs sought to pursue a class action in arbitration against various shipping companies. *Stolt-Nielsen*, 2010 WL 1655826 at *4. The parties agreed that

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[1] Ms. Watts does not dispute that the FAA governs the arbitration agreement; indeed the Agreement says so expressly. [R.p. 1100, Arbitration Agreement ("The parties acknowledge and agree that the Federal Arbitration Act . . . shall govern any arbitration under this Agreement.").] The FAA and the United States Supreme Court decisions interpreting it bind this Court. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (2001); *South Carolina v. Yetter*, 192 S.C. 1, 5 S.E.2d 291 (1939) (State courts look to decisions of the United States Supreme Court in determining issues involving a federal question); *U.S. v. Gilbert*, 345 U.S. 361, 363 (1953) ("the meaning of a federal statute is for [the United States Supreme Court] to decide"); *see also Atlantic Coast Line R.R. Co. v. Wannamaker Chem. Co.*, 216 S.C. 226, 233, 57 S.E.2d 311 (1950) (South Carolina Supreme Court bound by the terms of the Interstate Commerce Act "and the decisions of the United States Supreme Court construing same").

their arbitration clause was "silent" on the issue of class arbitration. *Id.* The arbitration panel held that the arbitration clause allowed for class arbitration. The United States Supreme Court disagreed, holding that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding all parties to the pertinent arbitration provision agreed to arbitrate on a class basis. *Id.* at *13.

The Court held that under the FAA courts and arbitrators must "give effect to the contractual rights and expectations of the parties." *Id.* at *11. The parties' "intentions control," and they are "generally free to structure their arbitration agreements as they see fit." *Id.* at *11-12. Therefore, the parties may agree to limit the issues arbitrated and may agree to the rules under which an arbitration will proceed. *Id.* at 12. Additionally, "parties may specify *with whom* they choose to arbitrate their disputes." *Id.* (citing *EEOC v. Waffle House, Inc.*, 534 U. S. 279, 289 (2002)). Under the FAA it "falls to courts and arbitrators to give effect to these contractual limitations." *Id.* When doing so, "courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties." *Id.*

The Supreme Court therefore concluded that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at *13 (emphasis in original). The Court found that the "differences between bilateral and class-action arbitration are too great for arbitrators to presume . . . that the parties' mere silence on the issue of class-arbitration constitutes consent to resolve their disputes in class proceedings." *Id.* Because the parties had reached "no agreement" on the issue of class arbitration, the parties could not "be compelled to submit their dispute to class arbitration." *Id.*

If a party cannot be compelled to class arbitration absent an agreement to arbitrate as a class, a fortiori the FAA preempts any public policy requiring class arbitration even where

the parties agreed *not* to arbitrate as a class. *See Toler's Cove Homeowners Ass'n*, 355 S.C. at 605, 611. Indeed, after *Stolt-Nielsen* class action waivers are superfluous because courts and arbitrators cannot compel class arbitration unless parties affirmatively agree to that procedure. *Stolt-Nielsen*, 2010 WL 1655826, at *13.

The *Stolt-Nielsen* decision mandates reversal of the Circuit Court's opinion and a remand directing the Circuit Court to compel Ms. Watts to arbitrate her claim on an individual basis as the agreement requires. Indeed, there are more compelling reasons to reject class arbitration here than in *Stolt-Nielsen*. Whereas the parties in *Stolt-Nielsen* reached "no agreement" on the issue of class arbitration, here, the parties expressly agreed *not* to arbitrate on a class basis. As a result, if class arbitration is precluded where the arbitration agreement is silent on the issue, then certainly a court cannot compel class arbitration where the parties explicitly agreed *not* to arbitrate on a class basis.

Century BMW insisted on remaining in a judicial forum only if this Court held that Century BMW had to arbitrate on a class basis, which is precisely what *Stolt-Nielsen* now prohibits. This Court should therefore withdraw its Opinion, reverse the Circuit Court's ruling and remand with directions to compel Ms. Watts to arbitrate her claims on an individual basis.

B. Under *Stolt-Nielsen*, Class Arbitration Is Impermissible Because Absent Class Members Would Not Be Bound To a Result.

As this Court noted, virtually all of Century BMW's customers signed the arbitration agreement, in which the parties agreed not to arbitrate as a class. As a result, in addition to Century BMW and Ms. Watts, none of the absent class members has contractually agreed to class-wide arbitration. Given the Supreme Court's holding in *Stolt-Nielsen* that a party cannot be compelled to class arbitration absent an agreement, sending Century BMW and absent class members into class arbitration (i) would violate due process by seeking to compel the

absent class members into class proceedings against their will, and (ii) would violate Century BMW's due process rights by compelling it to defend a representative action where the absent class members would not be bound to a result in Century BMW's favor.

One of the most basic expected benefits of arbitration is that it will lead to a "mutual, final and definite award." 9 U.S.C. § 10(a)(4). From a defendant's perspective, the principal advantage of a class action is finality—obtaining a judgment that will bind the entire class. *See, e g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985) ("Whether it wins or loses on the merits, [defendant] has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as [defendant] is bound."); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 402-03 (1980) (avoiding inconsistent judgments is a principal protection that class actions afford defendants). Such finality cannot be achieved without ensuring adequate due process protections for absent class members. *Shutts*, 472 U.S. at 811-12 ("If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection."). Compelling absent class members to a class arbitration to which they did not agree would deny the members due process and confront Century BMW with the prospect of class litigation without the assurance of finality.[2]

Where, as here, absent class members have not agreed to arbitrate as a class, *Stolt-Nielsen* precludes an adjudicator (whether a judge or an arbitrator) from compelling them into

[2] Moreover, although the court below purported to allow Ms. Watts to proceed in a representative capacity, it has not defined the group she purports to represent, has not found that her claims are typical of the group's claims, has provided the group with no notice, and has provided no procedure for group members to opt out. Nor has the court evinced any intent to do or address any of these issues in the future. These blatant due process problems underscore Century BMW's continuing concern that any class-wide arbitral award or settlement would lack finality.

class arbitration. Moreover, because the absent class members expressly agreed not to participate in a class arbitration, the members could cite *Stolt-Nielsen* for the proposition that they cannot be bound by an award resulting from an arbitration proceeding to which they never agreed.[3] *See Volt Info. Scis., v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989) (arbitration "is a matter of consent, not coercion."). Indeed, because a party cannot be compelled to class arbitration absent an agreement to do so, and none of the absent class members agreed to arbitrate as a class, a court or arbitrator would lack any basis to give a class-wide arbitral award or settlement *res judicata* effect. Compelling Century BMW to a class arbitration would thus deprive it of the certainty that, if it wins or settles the case, all of the absent class members would be bound by the outcome.

As a result, compelling Century BMW to arbitrate in a class arbitration would violate absent class members' due process rights and eliminate Century BMW's ability to achieve finality in arbitration.

II. THE SOUTH CAROLINA LEGISLATURE DID NOT INTEND TO CREATE A NON-WAIVABLE RIGHT TO BRING A CLASS ACTION UNDER THE DEALERS ACT.

Even were it not for the intervening *Stolt-Nielsen* opinion, this Court should reconsider its decision because the South Carolina legislature did not intend to create a non-waivable class action right under the Dealers Act.

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[3] Even were absent class members given the ability to opt out of a class (which the Circuit Court has shown no intention of providing), that would not remedy this concern. *Stolt-Nielsen* held that "silence" could not constitute "consent to resolve [a] dispute in class proceedings." *Id.* at *14. As a result, an absent class member's failure to opt out—presumably by remaining silent—does not mean, as a matter of law, that he or she "agreed to authorize class arbitration." *Id.* That is particularly true here because the absent class members expressly agreed *not* to arbitrate as a class.

A. Ms. Watts Has the Burden of Proving that the Right to Collective Action Is Non-Waivable.

A party opposing waiver of a statutory right has the burden of proving that the legislature "intended to preclude waiver." *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Adkins v. Labor Ready, Inc*, 303 F.3d 496, 503 (4th Cir. 2002); *Randolph v. Green Tree Fin. Corp*, 244 F.3d 814, 818 (11th Cir. 2001). If the legislature intended to preclude "waiver of the right . . . that intention will be deducible from text [of the statute] or [its] legislative history." *See, e.g., Gilmer*, 500 U.S. at 28 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, (1985)); *Long John Silver's Rests., Inc. v. Cole*, 514 F.3d 345, 350 (4th Cir. 2008).

On the face of the pleadings, Ms. Watts did not meet her burden, having failed to allege that the statutory right to bring a collective action under S.C. Code Ann. § 56-15-110(2) is non-waivable. Even if this Court were inclined to disregard Ms Watts's failure even to allege that the right to collective action is non-waivable, the text of the Dealers Act and the legislative history of § 56-15-110(2) provide no indication or support that the legislature intended to create a non-waivable right. To the contrary, the legislature was capable of making the class action right non-waivable, but declined to do so.

B. Neither the Text of the Dealers Act, Nor the Legislative History of the Collective Action Provision Evinces Any Legislative Intent to Create a Non-Waivable Right.

1. That a Legislature Confers a Statutory Right Does Not Mean that It Intended to Preclude Parties From Bargaining Around the Right.

As this Court reaffirmed in *Simpson v. MSA of Myrtle Beach, Inc.*, "parties are always free to contract away their rights." 373 S.C. 14, 28 644 S.E.2d 633 (2007). This is no less true in the context of arbitration. Indeed, the "primary" purpose behind the FAA is "to

ensure that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen*, 2010 WL 1655826, at *11.

As a result, parties generally may enter into agreements extinguishing or limiting statutory provisions that confer a right on one or both parties. *See Gilmer*, 500 U.S. at 26-32. Consistent with this contractual freedom, courts have long distinguished between a statutory right and a *non-waivable* statutory right. Courts across the country—including the Supreme Court of the United States—have concluded that absent a legislature's clear intention to preclude waiver, parties are free to waive their right to participate in a representative action.

The Supreme Court of the United States's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), is directly on point. There, an employer moved to compel arbitration of an employee's lawsuit alleging that the employee's termination violated the Age Discrimination in Employment Act ("ADEA"). The employee opposed arbitration, arguing the arbitral forum did not adequately further the purposes of the ADEA because arbitration did not, *inter alia*, provide for a "class action." Although the ADEA explicitly provided a right to sue collectively, *see* 29 U.S.C. § 626(b) (referencing the remedies in 29 U.S.C. § 216 ("An action . . . may be maintained against any employer . . . by any one or more employees for and on behalf of himself or themselves and other employees similarly situated.")), the Court ruled that the ADEA did not preclude arbitration notwithstanding the unavailability of a class action:

> But even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the ADEA provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.

Id. at 32 (internal quotation omitted). Because nothing in the text or legislative history of the ADEA indicated that Congress intended to make the class action right non-waivable, the *Gilmer* Court compelled the parties to arbitration pursuant to their arbitration agreement.[4]

Numerous courts have echoed *Gilmer*'s holding that providing a statutory right to pursue a class action does not create a non-waivable class action right.

In *Bowen v. First Family Fin, Servs.*, 233 F.3d 1331 (11th Cir. 2000), plaintiffs filed a class action lawsuit, claiming that the defendant-lender's practice of requiring customers to sign arbitration agreements before obtaining a consumer loan violated the Equal Credit Opportunity Act ("ECOA"), 15 U.S.C. § 1691 et seq., and the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 et seq. Plaintiffs contended that the ECOA and the TILA granted consumers a non-waivable right to litigate any claims arising under the statutes through a class action. The Eleventh Circuit observed that the ECOA provided a party with a statutory right to pursue a class action. *See id.* (citing 15 U.S.C. § 1691e).[5] Moreover, the court recognized that a "class action is an available, important means of remedying violations of the TILA," noting that the TILA contained (1) a provision regarding class action remedies, 15 U.S.C. § 1640(a), and (2) a legislative history "which stresses the importance of class action procedures in the TILA scheme." *Id.* at 1337. The court found, however, that "there exists a difference between the availability of the class action tool, and possessing a blanket right to that tool under any circumstance." *Id.* at 1337 (quoting *Wood v. Cooper Chevrolet, Inc.*, 102 F. Supp. 2d 1345,

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[4] That the ADEA was enacted "to further important social policies" did not change the Court's conclusion that arbitration was permissible despite the parties' inability to pursue claims on a class-wide basis. *Id.* at 27.

[5] "Any creditor who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class." 15 U.S.C. 1691e(a).

1349 (N.D.Ala.2000)). Despite the statutory importance of the class action right, the court could not glean "an intent to create [a] . . . non-waivable right to litigate by class action . . . from the text and the legislative history." *Id.* at 1338. Although "the legislative history of § 1640" revealed that "Congress thought class actions were a significant means of achieving compliance with the TILA, *see* S. Rep. 93-278 (1973), it d[id] not indicate that Congress intended to confer upon individuals a non-waivable right to pursue a class action nor does it even address the issue of arbitration." *Id* As a result, "Congress did not create a non-waivable right to pursue TILA claims . . . through a class action." *Id.*[6]

Similarly, in *Johnson v. West Suburban Bank*, the plaintiff argued that the TILA created a non-waivable right to bring a class action. 225 F.3d 366, 369 (3d Cir. 2000). The Third Circuit disagreed, holding that arbitration "clauses are effective even though they may render class actions to pursue statutory claims under the TILA . . . unavailable." *Id.* The court found that nothing in the text of the TILA created a non-waivable right to bring a class action. Although the plaintiff argued that the legislative history "demonstrates the centrality of class actions to the TILA's effective enforcement," the court concluded that such history did not demonstrate legislative intent to create a non-waivable right: "simply because judicial remedies are part of a law does not mean that Congress meant to preclude parties from bargaining around their availability." *Id.* at 377. The Third Circuit thus held that Congress did not intend to preclude parties from contracting away their ability to seek class action relief under the TILA. *Id. at 378.*

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[6] *See also Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 818-19 (11th Cir. 2001) (finding that Congress did not intend to preclude parties from contracting away their ability to seek class action relief under the TILA, and therefore, "a contractual provision to arbitrate TILA claims is enforceable even if it precludes a plaintiff from utilizing class action procedures in vindicating statutory rights under TILA.").

The Fourth Circuit adopted this rationale in *Adkins v. Labor Ready, Inc* , 303 F.3d 496 (4th Cir. 2002). There, an employee brought a class action alleging that a temporary employment agency violated the Fair Labor Standards Act ("FLSA"). The court found that the employee failed to "carry his burden of proof" that "Congress intended to confer a nonwaivable right to a class action under [FLSA]." *Id.* at 503. Citing *Johnson*, the Fourth Circuit confirmed that "simply because judicial remedies are part of a law does not mean that Congress meant to preclude parties from bargaining around their availability." *Id.* Because the employee pointed to "no suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a nonwaivable right to a class action under that statute . . . [h]is inability to bring a class action . . . [could not] suffice to defeat the strong congressional preference for an arbitral forum." *Id.*[7]

2. The Text of the Dealers Act Does Not Evince Any Legislative Intent To Create a Non-Waivable Right to Collective Action.

The text of the Dealers Act demonstrates that the legislature did not intend to create a non-waivable right to pursue a collective action.

First, nothing in the Dealers Act states that the right to collective action is non-waivable. When interpreting a statute, this Court looks to the "plain language of the statute

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[7] Similarly, in *Gipson v. Cross Country Bank*, 294 F. Supp. 2d 1251 (M.D. Ala. 2003), the plaintiff argued that an arbitration clause's prohibition on class actions rendered the entire clause unenforceable because it limited remedies that were available to her under the Fair Credit Billing Act ("FCBA"), 15 U.S.C. § 1666. The court observed that the FCBA permits plaintiffs to "seek classwide relief pursuant to the TILA's general civil liability provision," which provides a statutory right to pursue a class action. *Id.* at 1258 (citing 15 U.S.C. § 1640(a)(2)(B) (stating that "any creditor who fails to comply with the requirements imposed under . . . [the FCBA] . . . is liable to such person in an amount equal to the sum of . . . in the case of a class action, such amount as the court may allow . . . . ")). Despite this statutory right, the court concluded that the prohibition on class actions was "enforceable" because the plaintiff was unable to establish a congressional intent to create a non-waivable right. *Id.* at 1260.

itself." *King v Am. Gen Fin., Inc.*, 386 S.C. 82, 90, 687 S.E.2d 321 (2009) (internal quotation omitted). Here, this Court relied on § 56-15-130 to conclude that the collective action right was non-waivable, but § 56-15-130 will not bear that weight. Section 56-15-130 states that any contract "in *violation* of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable." (emphasis added). That a contract waives a provision does not mean that the contract "violat[es]" the provision. *See Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992) (statutes "must receive a practical, reasonable, and fair interpretation"). Indeed, the South Carolina legislature recognizes that "waiver" and "violation" are two different things, having included both concepts in S.C. Code § 27-32-110: it "is a *violation* of this chapter . . . to . . . . include in a contract a provision purporting to *waive* a right or benefit provided for purchasers pursuant to this chapter." § 27-32-110(10) (emphasis added). By contrast, § 56-15-130 does not state that a waiver of a right provided by the Dealers Act constitutes a violation of the Act.

Moreover, an interpretation conflating "violate" with "waive" would openly ignore the plain language of the statute (since "violate" is not synonymous with "waive"), and lead to absurd results. *See Lancaster County Bar Ass'n v. S C. Comm. on Indigent Defense*, 380 S.C. 219, 670 S.E.2d 371 (2008) (courts should avoid a statutory construction that would lead to an absurd result); *McLeod v. Montgomery*, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964). For example, § 56-15-110(1) grants a party the right to "sue . . . in the court of common pleas." Every arbitration agreement between a dealership and a customer waives the parties' right to sue in court under the Dealers Act. As a result, if "violate" means "waive," then any agreement to

arbitrate under the Dealers Act would be unenforceable.[8] Yet this Court recognizes—as it must under the FAA—that agreements to arbitrate Dealers Act claims are enforceable. *See Herron*, 2010 WL 1541297, at *5 (finding Century BMW's arbitration agreement "enforceable," except for the class action waiver). Just as an agreement to arbitrate does not "violate" § 56-15-110(1), an agreement to waive a party's right to bring a class action does not "violate" § 56-15-110(2).

Third, other provisions within the Dealers Act make clear that § 56-15-130 was not enacted to preclude waiver of all rights provided under the Act. *See Higgins v. South Carolina*, 307 S.C. 446, 449, 415 S.E.2d 799 (1992) ("In construing statutory language, the statute must be read as a whole . . . ."). The Dealers Act contains several subsections that specifically limit the types of provisions that can go into a contract. *See, e.g.*, S.C. Code Ann. §§ 56-15-40(3)(k) (precluding manufacturer from requiring a motor vehicle dealer "to assent to a release [or] waiver . . . which would relieve any person from liability imposed by this Chapter), (i) (precluding manufacturer from preventing a dealer from selling or transferring his interest), (h) (precluding manufacturer from preventing a dealer from changing the capital structure of his dealership); 56-15-40(4)(a) (dealer cannot require new motor vehicle buyer to also purchase special features not already installed on the vehicle when received by the dealer); 56-15-70 (manufacturer cannot impose unreasonable restrictions on motor vehicle dealer regarding right to renew, transfer, etc.), 56-15-140 (venue must be in South Carolina for any action brought under the Dealers Act). By enacting § 56-15-130, the legislature provided an enforcement mechanism to ensure compliance with these limitations: any contractual provision that contravenes these specific requirements "violat[es]" the Act and therefore, is unenforceable. Unlike the above

[8] Indeed, if a "waiver" constitutes a "violation," then most agreements to arbitrate a civil damages claim under the FAA would "violate" the Seventh Amendment to the United States Constitution. U.S. Const. Amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .").

provisions, § 56-15-110(2) does not specifically prohibit a party from waiving its right to pursue a collective action.

Finally, the lack of a provision in the Dealers Act precluding waiver of the right to collective action demonstrates that the South Carolina legislature did not intend to create a non-waivable right. When the legislature creates non-waivable rights, it says so expressly, including in the consumer protection context. The South Carolina code is replete with examples:

- § 33-44-103, which regulates operating agreements for a limited liability company, delineates seven "nonwaivable provisions," including that an operating agreement "may not . . . eliminate the duty of loyalty" or "eliminate the obligation of good faith and fair dealing."

- § 33-44-203(c), regarding articles of organization of a limited liability company, states that the article of organization "may not vary the nonwaivable provisions of § 33-44-103(b)."

- § 37-1-107 of the Consumer Protection Code states that "[e]xcept as otherwise provided in this title, a buyer, lessee or debtor may not waive or agree to forego rights or benefits under this title."

- § 37-3-410 of the Consumer Protection Code states that "An agreement may not limit or waive the claims or defenses of a debtor under this section."

- § 36-9-602, pertaining to secured transactions, states that "[e]xcept as otherwise provided in Section 36-9-624, to the extent that they give rights to a debtor or obligor and impose duties on a secured party, the debtor or obligor may not waive or vary the rules stated in the following listed sections . . . ."

- § 27-32-110, which addresses vacation time sharing plans, states that it "is a violation of this chapter for a seller of vacation time sharing plans to . . . . include in a contract a provision purporting to waive a right or benefit provided for purchasers pursuant to this chapter."

- § 27-29-160, regarding remedies for purchasers of subdivided land, provides that "[a]ny stipulation or provision purporting to bind any person acquiring subdivided to waive compliance with the chapter or any rule or order under it is void."

- § 56-31-30, which regulates the rates and fees a rental car company can charge, provides that a "waiver of the requirements of the provisions of this section is unenforceable as contrary to public policy."

This sample of South Carolina statutes confirms that the legislature knows how to make a right "non-waivable." Because in the Dealers Act the legislature did not restrict a party's ability to waive its right to collective action, the text of the Act plainly establishes that the legislature did not intend to create a non-waivable right.

3. Nothing in the Legislative History of § 56-15-110(2) Suggests that the Legislature Intended to Confer a Non-Waivable Right to Collective Action.

The legislative history of § 56-15-110(2) contains no indication that the legislature intended to create a non-waivable right to pursue a collective action. Instead, the language of the statute and the prevailing law on class actions at the time the statute was enacted demonstrate that the only purpose of § 56-15-110(2) was to remove a then-existing impediment to filing a class action for personal damages.

The law at the time of the statute's enactment sheds light on its purpose. Section 56-15-110, adopted in 1972, predated Rule 23 and the other South Carolina Rules of Civil Procedure. Before the adoption of Rule 23, SCRCP, class actions were governed by state statute (*e.g.*, § 15-5-50). Indeed, the wording in subsection (2) closely mirrors this statutory predecessor to Rule 23, SCRCP. *Compare* S.C. Code Ann. § 56-15-110(2) ("When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief.") *with* S.C. Code Ann. § 15-5-50 (repealed 1985) ("When the question is one of common or general interest to many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.").

At the time, however, the "general rule as developed by case law in the State [was] . . . that actions at law for personal remedies [could] not be brought as class actions."

General Supplies, Inc v Southwire Co., 276 S.C. 55, 58, 275 S.E.2d 579, 580 (1981). As a result, state law prevented the plaintiffs in *General Supplies* from bringing a class action for damages under the state antitrust act.

Consistent with *General Supplies*, if the legislature had not included subsection (2), which permits a plaintiff to bring an action for damages as a class action, then no such action would have been allowed under the Dealers Act. As the *General Supplies* Court noted, "[a]bsent a statutory direction to the contrary, the personal remedy provided for at Section 39-3-30 may not be sought through a class suit." *General Supplies*, 276 S.C. at 59, 275 S.E.2d at 581. Section 56-15-110(2) supplied the statutory direction that this Court found lacking in the state antitrust act and thus permitted class actions under the Dealers Act before Rule 23 was adopted. But nothing suggests the legislature intended the class action vehicle to be non-waivable.

In 1985, the South Carolina Rules of Civil Procedure were adopted and the Legislature simultaneously repealed various Code portions relating to procedural rules. Act No. 100, 1985 S.C. Acts 277 (effective July 1, 1985); Rule 86, SCRCP (Rules effective July 1, 1985). The Legislature explicitly provided that, upon taking effect, the Rules would control procedures in a civil lawsuit in the event of any conflicts between the new rules and existing statutes. As provided in Act No. 100:

> In event of conflict between any provision of the South Carolina Rules of Civil Procedure and *any other statutory provisions as to practice and procedure not repealed by this act, the provision of the rules shall control.* However, neither the promulgation of the rules nor this act may be construed to affect the substantive legal rights of any party to any civil litigation in the courts of this State but shall affect only matters of practice and procedure.

Act No. 100 § 3, 1985 S.C. Acts at 280 (emphasis added). South Carolina courts immediately recognized that the Rules control matters of procedure, regardless of previously enacted statutes.

See McGann v. Mungo, 287 S.C. 561, 568, 340 S.E.2d 154, 156 (1986) (new civil procedure rules, not former statutes, applied in lawsuit); *Harper v. Ethridge*, 290 S.C. 112, 121, 348 S.E.2d 374, 379 (1986) (new rules of civil procedure replaced statute). Section 56-15-110(2) is a pre-Rules statute that allowed the filing of a class action against a manufacturer, dealer or distributor in appropriate circumstances. After the adoption of the Rules, § 56-15-110(2) is merely a vestige of a prior procedural regime.

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Taken together, the language of the Dealers Act and the legislative history of § 56-15-110(2) clearly demonstrate that the South Carolina legislature did not intend to create a non-waivable right to pursue a collective action under the Dealers Act.

III. EVEN UNDER THIS COURT'S RATIONALE MS. WATTS'S SECOND AND THIRD CAUSES OF ACTION, WHICH DO NOT ARISE UNDER THE DEALERS ACT, SHOULD BE COMPELLED TO INDIVIDUAL ARBITRATION.

The Court's rationale in affirming the trial court's denial of Century BMW's motion to compel arbitration was limited to the Dealers Act. *Herron*, 2010 WL 1541297, at *5 (the legislature provided "consumers with a non-waivable right to bring class action suits for violations of the Dealers Act."). Only one of Ms. Watts's claims, however, arises under the Dealers Act.

The Complaint asserts three causes of action. The first cause of action seeks damages under § 56-15-110(2) based on violations of the Dealers Act. *See* First Amended Complaint at ¶¶ 391-401. By contrast, the second and third claims (for civil conspiracy and declaratory judgment) do not arise under the Dealers Act. As a result, even if there were a non-waivable class action right under the Dealers Act, the Court identified no similar non-waivable right that applied to a claim for common law conspiracy or declaratory judgment. Even under the Court's rationale, therefore, it should compel individual arbitration of Counts II and III.

CONCLUSION

For the reasons set forth above, Century BMW respectfully requests that this Court withdraw its opinion, reverse the Circuit Court, and remand with instructions to compel Respondent Watts to arbitrate all of her claims individually.

Respectfully submitted,

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May 3, 2010
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, Circuit Court Judge

Circuit Court Case No.: 2006-CP-02-1230

Court of Appeals Docket No.: 03-27371

Heather Herron, Natalie Armstrong, Michael Ritz, Julie Freeman, Christine Watts, Michael Blease and David Carroll,[1] individually and for the benefit of all car buyers whom paid "administrative fees" as described below to Defendants,..... Respondents,

v.

Century BMW d/b/a Sonic Automotive; Dick Dyer & Associates, Inc.; Galeana Chrysler Plymouth, Inc. a/k/a Galeana Chrysler Jeep, Inc.; J.L.H. Investments, LP a/k/a Hendrick Honda; Overland, Inc., d/b/a Land Rover of Columbia; Taylor Toyota a/k/a Taylor Investments, Inc.; and Toyota of Greenville, Inc.,..... . . . Defendants,

of whom Century BMW d/b/a Sonic Automotive is the.....Appellant.

RESPONDENTS' RETURN TO THE APPELLANT'S PETITION FOR REHEARING

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[1] David Carroll was substituted for Michael Watts as the named Plaintiff for Toyota of Greenville by Order of the Circuit Court dated October 12, 2009.

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Respondents file this Return to the Appellant's Petition for Rehearing. For the reasons set forth herein, the Petition should be denied.

ARGUMENT

I. The main argument concerning preemption has never been raised before and it is not appropriate in a petition for rehearing.

In its rehearing petition, Appellant Century ("Century") argues for the first time that "[t]he FAA clearly preempts South Carolina law" to the extent that our state law allows classwide proceedings in this case. (Pet for Rehearing at 3-4). This argument has never been raised before the trial court or during the appeal in this Court, and therefore, cannot be raised at this time.

An argument may not presented for the first time in a rehearing petition. *See Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 532 (S.C. 2001). "In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument." *Id.* (citing Rule 221(a), SCACR). "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999). In declining to entertain an argument presented for the first time in a rehearing petition, *Kennedy* "reiterate[d] this Court's longstanding principle of error preservation." 349 S.C. at 532. Following that approach, "South Carolina cases clearly hold that one cannot present

and try a case on one theory and then attack the result below by presenting another theory on appeal." *Id.* (citing *See Butler v. Town of Edgefield*, 328 S.C. 238, 493 S.E.2d 838 (1997)).[1]

In its briefs to this Court, Century's arguments included only the following: there is presumption in favor of arbitration; the agreement was not unconscionable due to oppressive or one-sided terms; the agreement was not a contract of adhesion; there was equal bargaining power; arbitration provided an effective forum; Respondents had an opportunity to read the agreement; and Respondents had the opportunity to make a meaningful choice. Neither the Final Brief nor the Final Reply Brief of Appellants raised a preemption argument. Preemption was never mentioned. For this reason alone, the petition for rehearing should be denied.

II. The case upon which Century relies involves the interpretation of a federal statute, and not preemption, and does not apply here.

The Petition for Rehearing relies heavily on the Supreme Court's recent decision in *Stolt-Nielsen S.A. v. Animalfeeds International*, ___ U.S. ___, 2010 WL 1655826 (Apr. 27, 2010). However, a recent case addresses the same argument made here. In *McArdle v. AT&T Mobility, LLC*, 2010 WL 1875812 (N.D. Calif. May 10, 2010), a California district court considered whether the *Stolt-Nielsen* decision mandated a reconsideration of its ruling that a prohibition on class actions was unconscionable. In that case, as here, the defendant argued that *Stolt-Nielsen* created "a substantial question as to whether the FAA would pre-empt any holding" that state law would not enforce the arbitration agreement. In response, the court stated:

> The Court disagrees. The issue presented in *Stolt-Nielsen* was "whether imposing class arbitration on parties whose arbitration clauses are 'silent' on that issue is consistent with the Federal Arbitration Act (FAA)." The Supreme Court did not

[1]The fact that the *Stolt-Nielsen* opinion was issued after this Court's decision does not change this analysis because federal courts in various circuits have addressed preemption under the FAA, and Appellant could have raised issue through those cases.

> address FAA preemption. Nor did it overrule its precedent upon which the Ninth Circuit relied in *Shroyer v. New Cingular Wireless Services, Inc.*, which held that a California law on unconscionability could render an arbitration clause unenforceable. *Stolt-Nielsen* is distinguishable on both the facts and the law, and therefore, does not require this Court to reconsider its order on Defendants' Motion to stay this action pending their appeal.

Id. (internal citations omitted). *Stolt-Nielsen* did not even mention *Shroyer*, which found that the FAA does not prevent courts from applying generally applicable state law principles in refusing to enforce a class action waiver.[2]

Stolt-Nielsen--which discussed neither unconscionability nor preemption--has no bearing on this case and does not undermine this Court's opinion. *Stolt-Nielsen* merely found that where an arbitration agreement was silent as to classwide arbitration, the parties could not, under the Federal Arbitration Act 9 U.S.C. §1 et seq. ("FAA"), be forced into classwide arbitration:

> a party may not be compelled under the FAA to submit to class arbitrations unless there is a contractual basis for concluding that the parties *agreed* to do so.

Id. (emphasis in original). The Supreme Court also stated that:

> an implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator can infer solely from the fact of the parties' agreement to arbitrate.

Id. The issue raised in *Stolt-Nielsen* is not remotely present in this case, and does not bear on the question presented. Here, there is no dispute that Century BMW's arbitration agreement addresses classwide arbitration.[3] The issue here is not (as in *Stolt-Nielsen*) whether a party may be compelled to participate in class arbitration in the face of an agreement that is silent as to classwide arbitration, but rather whether the agreement itself must be interpreted under generally

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[2]Shroyer, 498 F.3d 976, 987 (9th Cir. 2007).

[3]The clear questioned answered by this Court is what happens when a consumer protection law clashes with an arbitration agreement.

applicable South Carolina contract law. The Supreme Court did not address that issue in *Stolt-Nielsen*, and no party raised it. Indeed, the Supreme Court made clear that the arbitral decision under review there did not rest on general contract law at all. Slip op. at 8 (panel "did not attempt to determine what rule would govern under either maritime or New York law").

In addition, *Stolt-Nielsen* simply did not resolve the question of whether the FAA preempts general principles of state contract law that would render unconscionable class arbitration bans. However, every federal circuit and state court of last resort to have decided the question has reached the same conclusion: The FAA does not preempt court holdings that strike down particular class-action bans under state law. This Court's decision is consistent with the courts of last resort in at least nine states--Alabama, California, Illinois, Massachusetts, New Jersey, New Mexico, North Carolina, Washington, and West Virginia. *See, Feeney v Dell, Inc* , 908 N.E.2d 753, 762-68 (Mass. 2009) (holding that the FAA did not preempt a finding that a class action ban was unenforceable because it violated state public policy); *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1222 (N.M. 2008)(invalidation of the ban on class relief based on violation of public policy or unconscionability, a doctrine that exists for the revocation of any contract, is not preempted by the FAA); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 373 (N.C. 2008)(determination that state common law principles, such as unconscionability, make a contract unenforceable is not preempted by FAA); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1008-09 (Wash. 2007)(FAA did not preempt state law finding class action waiver unenforceable as against public policy); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 260-63 (Ill. 2006) (Finding no preemption where a state court applies state law on unconscionability to a question of the enforceability of a class action waiver); *Muhammad v. County Bank of*

Rehoboth, Del., 912 A.2d 88, 94-96 (N.J. 2006), *cert. denied*, 127 S. Ct. 2032 (2007) (FAA does not preclude an examination as to whether arbitration agreement is unconscionable under state law); *Discover Bank v. Superior Court of Los Angeles*, 113 P.3d 1100, 1110-17 (Cal. 2005)(FAA does not preempt finding of unconscionability on class actions bans, whether the ban in arbitration agreement or other contract); *Leonard v. Terminix Int'l Co., L.P.*, 854 So. 2d 529, 535-36 (Ala. 2002)(Under FAA, a state can find agreement enforceable based on general contract law); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 272 n.3 (W. Va. 2002)(FAA does not bar a state court from examining the conscionability of a contract that limits remedies afforded under state law.)[4]

The federal circuits that have decided the question presented have come to the same conclusion. The First, Third, Ninth, and Eleventh Circuits have all held that the FAA does not preempt determinations that class-action bans are invalid under state law. *See, e.g., Homa v. Am Express Co.*, 558 F.3d 225, 231 (3d Cir. 2009) (New Jersey law); *Lowden v. T-Mobile USA*, 512 F.3d 1213, 1219-22 (9th Cir. 2008) (Washington law), *cert. denied*, 129 S. Ct. 45 (2008); *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 57-59 (1st Cir. 2007) (Massachusetts law); *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 987-93 (9th Cir. 2007)

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[4]Intermediate courts in states including Missouri, Oregon, and Wisconsin have agreed. *See Vasquez-Lopez v. Beneficial Oregon, Inc.*, 152 P.3d 940, 944 (Or. App. 2007); *Coady v. Cross Country Bank, Inc.*, 729 N.W.2d 732, 746 (Wis. App. 2007), *review denied*, 737 N.W.2d 432 (Wis. 2007); *Whitney v. Alltel Communications, Inc.*, 173 S.W.3d 300, 308, 310 (Mo. App. 2005).

(California law); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1219 (11th Cir. 2007) (Georgia law); *see also Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119 (11th Cir. 2010) (certifying question whether a class ban is enforceable under Florida law to the Florida Supreme Court).

The fact that one arbitration agreement that is silent on class actions cannot impose class arbitration (which is all *Stolt-Nielsen* held) does not mean that all arbitration agreements that contain class bans are automatically valid. Century is disingenuous in suggesting *Stolt-Nielsen*'s holding extends that far.

Clearly, the *Stolt-Nielsen* decision did not address whether the FAA would preempt any state law that could render an arbitration clause unenforceable. The cases that have addressed the issue have found that the FAA does not effect such a preemption. *See*, p. 4-5, *supra*. As in *McArdle*, "*Stolt-Nielsen* is distinguishable on both the facts and the law" and thus, has no application here.

III. This Court properly held that the class action prohibition in the arbitration agreement is against public policy and unenforceable.

In the opinion issued April 19, 2010, this Court found that the ban on class action was against public policy because § 56-15-110 *et. seq* ("the Dealers Act") expressly provides a right to a class action.[5] The Dealers Act specifically states that if the Act is violated, "one or more [persons] may sue for the benefit of the whole...." Code Ann. §56-15-110(2). Section 56-15-30

states that "[a]ny contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable."

This Court's opinion recognized that the arbitration agreement, which took away a substantive right under the Dealers Act, violated public policy. In other words, an arbitration agreement (contract) cannot prohibit class actions in the face of a statutory provision that explicitly provides a public policy substantive right.

This Court's holding is not inconsistent with other courts' holdings. Various courts have held that class action waivers are unenforceable. *See, e.g., Johnson v. Tele-Cash, Inc*, 82 F.Supp.2d 264, 270 (D.Del.1999) (holding that inherent conflict existed between TILA right to class action and arbitration clause and refusing to enforce); *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F.Supp.2d 1087, 1105 (W.D.Mich.2000) (refusing to enforce arbitration agreement prohibiting class remedies that were expressly permitted by state consumer laws); *Shaffer v. Royal Gate Dodge, Inc.*, 300 S.W.3d 556, 561 (Mo.App. E.D.,2009)(In light of the strong public policy authorizing class actions in state consumer law, the court held that an arbitration agreement that prohibited class actions was unenforceable); *Schwartz v. Alltel Corp.*, 2006-Ohio-3353 ¶ 36, 2006 WL 2243649 (Ohio Ct.App.)(holding that the elimination of a consumer's right to proceed through a class action hindered the state consumer protection statute and therefore

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[5]While that provision could have been severed, Century stated that it did not wish to invoke the severance clause and expressed its intent for the arbitration agreement to stand or fall as a whole. *Herron*, Shearouse Adv. Sh. No. 15, p. 23.

was unenforceable). *See also, Ting v. AT & T,* 319 F.3d 1126, 1150 (9th Cir.2003); *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49(1st Cir. 2007); *Edwards v. Blockbuster Inc.,* 400 F.Supp.2d 1305, 1309 (E.D.Okla.2005); *Luna v. Household Fin. Corp. III,* 236 F.Supp.2d 1166, 1178 (W.D.Wash.2002); *Leonard v. Terminix Int'l Co , L.P.,* 854 So.2d 529, 538 (Ala. 2002); *Discover Bank v. Superior Court of Los Angeles,* 113 P.3d 1100 (Cal. App. 2005); *Powertel, Inc. v. Bexley,* 743 So.2d 570, 576 (Fla.Dist.Ct.App.1999); *Kinkel v. Cingular Wireless, L.L.C.,* 306 Ill.Dec. 157 (Ill. 2006); *Whitney v. Alltel Commc'ns, Inc.,* 173 S.W.3d 300, 314 (Mo.Ct.App.2005); *Muhammad v. County Bank of Rehoboth Beach,* 912 A.2d 88 (N.J. 2006); *Vasquez-Lopez v. Beneficial Or., Inc.,* 152 P.3d 940 (Or. App. 2007); *Thibodeau v. Comcast Corp.,* 912 A.2d 874 (Pa. 2006).[6] This Court's decision is also fully consistent with federal law. The plain text of the FAA makes arbitration agreements enforceable unless "such grounds as exist in law or equity for the revocation of any contract." 9 U.S.C. § 2. Under that savings clause, "generally applicable contract defenses such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2" of the FAA. *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681, 687 (1996). In its analysis, this Court determined that the ban on classwide arbitration was in violation of public policy because the ban took away substantive rights given by the Dealers Act, which is consistent with the FAA. *Herron,* Shearouse Adv. Sh. No. 15, p. 22-23.

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[6]Additional cases finding class actions bans unenforceable are in light of state laws

IV. This Court has already found that Appellants had a non-waivable substantive right under the Dealers Act and Century does not get another bite at the apple.

Century argues that the General Assembly did not intend to convey a substantive, non-waivable right to class actions. However, this Court has already considered this argument[7] and ruled that:

> the Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act and any contract prohibiting a class action suit violates our State's's public policy and is void and unenforceable.

Herron v. Century BMW, Shearouse Adv. Sh. No. 15, p. 22 (April 19, 2010). A petition for rehearing is not for the purpose of having the case tried for the second time. *Kennedy v. South Carolina Retirement Sys.*, S.C. Sup. Ct. Order, dated July 23, 2001.

Furthermore, courts across the country have found the right to a class action is nonwaivable. *See, Johnson v. Tele-Cash, Inc., Lozada v. Dale Baker Oldsmobile, Inc.,* and *Schwartz v. Alltel Corp.,* supra, p. 7.

Finally, the cases upon which Century relies do not apply. For example, *Gilmer v. Interstate/Johnson Lane Corporation,* 500 U.S. 20 (1991), does not involve a clause banning classwide arbitration in the arbitration agreement. In *Adkins v. Labor Ready, Inc.*, 303 F.3d 496 (4th Cir. 2002), not only was there no express ban on class actions in the agreement, the court did

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and/or remedies are listed on pp. 4-5 herein.

[7]Century included this argument in its Final Brief, p. 25.

not even consider the issue, finding that other defects in the plaintiff's case rendered "his further complaint about the inability to bring a class action moot." Id. at 503. In contrast, as this Court clearly held, the issue here involves an arbitration agreement that specifically prohibits classwide arbitration despite statutes that explicitly permits a suit for the benefit of a group and which states that any contract in violation of any provision of the chapter is against public policy. S.C. Code §§ 56-15-110 and 56-15-130.[8]

V. The remaining argument is without merit.

Century claims that Appellants' second and third causes of action, for civil conspiracy and declaratory judgment, do not arise under the Dealers Act and thus, Century is entitled to individual arbitration on those claims. These arguments are moot, because Century has already agreed to forego any individual arbitration rights in light of the court's ruling that the classwide arbitration ban is unenforceable:

> [C]ounsel for Century unambiguously stated at oral argument that Century did not wish to invoke the severance clause and sever the provision banning class actions from the remainder of the agreement. Counsel unequivocally expressed its intent for the arbitration agreement to stand or fall as a whole.

Herron, Shearouse Adv. Sh. No. 15 at 23.

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[8]With the exception of one (S.C. Code § 56-31-30), none of the statutes cited by Century as containing express waivers even mention public policy. Section 56-31-30 is similar to the statute here, §56-15-30, except this statute uses the word violate instead of waive. Century is arguing semantics.

CONCLUSION

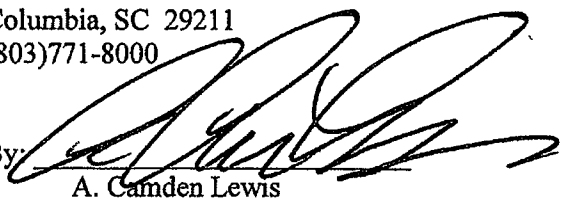
For the reasons set forth herein, Respondents respectfully submit that the Petition for Rehearing should be denied.

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May 21st, 2010

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge

Circuit Court Case No. 2006-CP-02-1230

Heather Herron, Natalie Armstrong, Michael Ritz, Julie Freeman, Christine Watts, Alison Dannert, Michael Blease, Michael Watts, individually and for the benefit of all car buyers who paid "administrative fees" as described below to Defendants, ... **Respondents,**

v.

Century BMW d/b/a Sonic Automotive; Dick Dyer & Associates, Inc.; Galeana Chrysler Plymouth, Inc., a/k/a Galeana Chrysler Jeep, Inc.; J.L.H. Investments LP a/k/a Hendrick Honda; Overland, Inc., d/b/a Land Rover of Columbia; Taylor Toyota a/k/a Taylor Investments, and Toyota of Greenville, Inc.,. . . . . **Defendants,**

of which Century BMW d/b/a Sonic Automotive is the . . . . . **Appellant.**

APPELLANT'S REPLY IN SUPPORT OF ITS PETITION FOR REHEARING PURSUANT TO RULE 221, SCACR

Re: Opinion 26805
Heard January 20, 2010 – Filed April 19, 2010

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2010 WL 1655826 (U.S April 27, 2010).. 1

OTHER

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----, 2010 WL 303962 (U S Jan. 25, 2010). 5

Reply Brief for the Petitioner, AT&T Mobility LLC v Concepcion, No. 09-893, --- S. Ct -
---, 2010 WL 303962 (U S. May 24, 2010) 5

Respondent's Return to the Petition for Rehearing (1) misconstrues *Stolt-Nielsen*, (2) entirely ignores the Due Process problems that would permeate class proceedings if this Court's opinion could lawfully co-exist with *Stolt-Nielsen*, (3) provides no evidence that in the Dealers Act the legislature intended to a create a non-waivable right to collective action, and (4) does not dispute that *Herron* allows the parties to arbitrate the second and third causes of action on an individual basis.

ARGUMENT

I. *Stolt-Nielsen* Mandates Reconsideration and Reversal.

A. Century BMW's Argument Regarding the Impact of *Stolt-Nielsen* Is Timely.

Respondent's waiver argument is wholly without merit. Century BMW has argued consistently that the Federal Arbitration Act ("FAA") governs this dispute and that the FAA requires enforcement of arbitration agreements according to their terms. *See* Appellant's Final Br. at 11 ("This Court should therefore reverse the circuit court's order as inconsistent with federal law and enforce the arbitration agreement.") & 27 (requesting the Court enter an order compelling arbitration "in accordance with the terms of the arbitration agreement"); Appellant's Reply Br. at 4 ("Ms. Watts's arbitration agreement is governed by the Federal Arbitration Act."). To the extent Respondent's argument is predicated on Century BMW's failure to raise previously the holding of *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, No. 08-1198, --- U.S. ----, 2010 WL 1655826 (U.S. April 27, 2010), Century BMW obviously could not cite a decision that the Supreme Court of the United States had not yet authored. Moreover, Century BMW brought *Stolt-Nielsen* to this Court's attention less than a week after the Supreme Court issued the decision.

B. *Stolt-Nielsen* Moots All Prior Debate Regarding the Enforceability of Class Action Waivers.

Respondent cites a number of pre-*Stolt-Nielsen* cases finding class action waivers unenforceable under a variety of theories. Century BMW can cite just as many finding such waivers enforceable; indeed the majority of courts addressing the issue found such waivers enforceable before *Stolt-Nielsen*. *See, e.g., Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005); *Livingston v Assocs. Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 374 (3d Cir. 2000); *Morgan v. Advance Am.*, 2008 WL 4191754, at *16 (D.S.C. Sept. 5, 2008); *Pomposi v. Gamestop, Inc.*, 2010 WL 147196, at *8-11 (D. Conn. Jan. 11, 2010); *Coffey v Kellogg Brown & Root*, 2009 WL 2515649, at *10-13 (N.D. Ga. Aug. 13, 2009); *Nayal v Hip Network Servs. IPA, Inc.*, 620 F. Supp. 2d 566, 573 (S.D.N.Y. 2009); *Stephens v. Wachovia Corp.*, 2008 WL 686214, at *6-7 (W.D.N.C. Mar. 7, 2008); *Milligan v. Comcast Corp.*, 2007 WL 4885492, at *2 (N.D. Ala. Jan. 22, 2007); *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 364-65 (Tenn. Ct. App. 2001). What Respondent does not grapple with is that *Stolt-Nielsen* moots this debate.[1] *Stolt-Nielsen*'s holding that the FAA precludes forcing a party to participate in a class arbitration absent that party's contractual agreement to do so made state law on the subject of class arbitration waivers irrelevant. Respondent is effectively arguing that the federal law's presumption violates state public policy, turning the Supremacy Clause on its head. If a party cannot be compelled to class arbitration absent contractual

[1] It is undisputed that *Stolt-Nielsen* applies to this case. *See, e.g., Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.").

evidence that it agreed to do so, it follows that a party cannot be forced to class arbitration where the parties expressly agreed *not* to arbitrate as a class.

C. The FAA Preempts South Carolina Law as *Herron* Construed It.

The FAA, as *Stolt-Nielsen* construed it, preempts any South Carolina public policy requiring class arbitration under the Dealers Act. Under *Stolt-Nielsen*, an arbitration clause that is silent as to class arbitration cannot be construed to allow this procedure; yet under *Herron*, an arbitration clause is per se invalid if it does not permit class arbitration. Thus, for *Herron* and *Stolt-Nielsen* to co-exist, South Carolina law would effectively require arbitration agreements – and only arbitration agreements – to include an explicit provision allowing for class arbitration. Under well-established Supreme Court of the United States and South Carolina precedent, however, the FAA precludes States from imposing unique requirements on arbitration agreements. *See Doctor's Assocs, Inc. v. Casarotto*, 517 U.S. 681 (1996) (FAA preempts state law conditioning enforceability of arbitration agreements "on compliance with a special notice requirement not applicable to contracts generally."); *Soil Remediation Co. v. Nu-Way Environmental, Inc.*, 323 S.C. 454 (1996) (holding that the "FAA preempts" South Carolina's requirement that contracts with arbitration agreements provide notice on the first page of the contract); *see also Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539 (2001) (a state law that "places arbitration clauses on an unequal footing with contracts generally . . . is preempted if the FAA applies."). State law therefore cannot condition the enforceability of arbitration agreements on the inclusion of a provision permitting class arbitration. Yet the *Herron* decision would void all agreements to arbitrate under the Dealers Act unless the parties expressly agree to class arbitration. By imposing this additional requirement on arbitration agreements under the Dealers Act, this Court's decision "singles out arbitration agreements," *Soil Remediation*, 323 S.C. at 459, and therefore, is preempted by the FAA.

D. Ms. Watts Ignores the Significant Due Process Problems this Court's Decision Would Create In Light of *Stolt-Nielsen*.

Ms. Watts may want to arbitrate on a class basis, but *Stolt-Nielsen* holds that the absent class members presumptively do not and that their silence does not equal consent to a class arbitration. Ms. Watts's Return does not contest that forcing the absent class members into class arbitration raises significant due process problems that Century BMW identified in its petition. Instead, Ms. Watts responds with silence. Given the Supreme Court's holding in *Stolt-Nielsen* that a party cannot be compelled to class arbitration absent an agreement, sending Century BMW and absent class members into class arbitration—even though virtually all of them expressly agreed *not* to arbitrate as a class—would violate due process by (1) compelling absent class members into class proceedings against their will, and (2) compelling Century BMW to defend a representative action in which the absent class members would not be bound to the result.

E. Subsequent Supreme Court Precedent Confirms that *Stolt-Nielsen* Mandates Reversal.

The actions of the Supreme Court of the United States subsequent to *Stolt-Nielsen* demonstrate that this Court should reconsider the *Herron* decision.

First, in *American Express Co., v. Italian Colors Restaurant*, No. 08-1473, --- S. Ct. ----, 2010 WL 1740528 (U.S. May 3, 2010), the Supreme Court granted certiorari, vacated the opinion of the United States Court of Appeals for the Second Circuit, and remanded the case for reconsideration in light of *Stolt-Nielsen*. The similarities between the Second Circuit's decision in *American Express* and this Court's decision in *Herron* are striking. In *American Express*, the Second Circuit held that class actions were necessary to allow parties to vindicate their statutory rights in arbitration, rather than relying on a finding of unconscionability. *In re Am. Express Merchants Litig.*, 554 F.3d 300, 304, 320 (2d Cir. 2009). Likewise, in *Herron*, this Court adopted a statutory rights analysis, rather than relying on unconscionability. *Herron v. Century*

BMW, No. 26805, --- S.E.2d ----, 2010 WL 1541297 (S.C. Apr. 19, 2010) (finding the arbitration agreement was not unconscionable). Moreover, just as in *Herron*, the Second Circuit effectively forced the defendant to choose between proceeding in class arbitration or remaining in court. *In re Am Express Merchants Litig.*, 554 F.3d at 321.

The Supreme Court's decision to grant certiorari, vacate the judgment in *American Express* and remand the case for reconsideration means that because of the intervening *Stolt-Nielsen* decision, the Court believes that there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration" and that "such a redetermination may determine the ultimate outcome of the litigation." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Thus, the Supreme Court clearly found that *Stolt-Nielsen* directly impacts—and likely invalidates— the Second Circuit's holding that the class action waiver was unenforceable under a statutory rights analysis. This Court should similarly reconsider its decision.

Second, on May 24, 2010, the Supreme Court granted certiorari in *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009). In *Laster*, the Ninth Circuit held that an arbitration provision was unconscionable under California law because it required customers to arbitrate on an individual basis. *AT&T Mobility LLC v Concepcion*, No. 09-893, --- S. Ct. ----, 2010 WL 303962 (U.S. May 24, 2010). In seeking certiorari, AT&T Mobility relied on *Stolt-Nielsen* to argue that the FAA preempts States from conditioning enforcement of an arbitration agreement on the availability of class arbitration. *See Reply Brief for the Petitioner, AT&T Mobility LLC v. Concepcion*, No. 09-893 at 3-5 (May 3, 2010); *Petition for Writ of Certiorari, AT&T Mobility LLC v Concepcion*, No. 09-893 at 34 (Jan. 25, 2010).

Third, the United States District Court of Colorado recognized in *Stender v. Cardwell,* 2010 WL 1930260, at *5 (D. Colo. May 12, 2010), that *Stolt-Nielsen* eviscerated plaintiffs' argument that barriers to class arbitration made the arbitration agreement unenforceable. Indeed, the consequences of *Stolt-Nielsen* were so apparent that plaintiffs abandoned their class arbitration argument altogether. *Id.*

Finally, Respondent's reliance on *McArdle v. AT&T Mobility LLC* is disingenuous. Not only does Respondent's Return ignore the Supreme Court's decision in *American Express*, but also *McArdle* is inapposite. Unlike *Herron* and *American Express*, the court in *McArdle* invalidated the arbitration agreement based on its finding that the class arbitration waiver was unconscionable. *See McArdle v. AT&T Mobility LLC*, No. C 09-1117, 2010 WL 1875812, at *1 (N.D. Cal. May 10, 2010). *McArdle* also held that the class arbitration waiver was not severable from the rest of the arbitration provision, and therefore, the entire arbitration provision was unenforceable. Moreover, as noted, the Supreme Court has now granted certiorari in the Ninth Circuit case upon which *McArdle* principally relied. *See McArdle*, 2010 WL 1875812, at *1 n.1 (citing *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009)).

****

In light of *Stolt-Nielsen,* the Supreme Court's decision in *American Express,* and the *Herron* Court's reliance on a similar statutory rights argument, this Court should reconsider its decision.

II. Ms. Watts Failed to Meet Her Burden of Establishing that the Right to Collective Action is Non-Waivable.

Other than the ipse dixit argument that the difference between "waive" and "violate" is a semantic one (something that is clearly untrue), Ms. Watts's Return does not offer any argument that the South Carolina legislature intended to create a non-waivable right to pursue a collective

action under the Dealers Act. As discussed in Century BMW's petition, neither the text of the Dealers Act nor the legislative history of § 56-15-110(2) support this Court's holding. The Court should therefore reconsider its decision.

III. Ms. Watts Concedes that the Second and Third Causes of Action Do Not Arise Under the Dealers Act.

Ms. Watts does not dispute that (1) this Court's rationale in *Herron* was limited to the Dealers Act, and (2) her second and third causes of action do not arise under the Dealers Act. As a result, Ms. Watts does not contest the merits of Century BMW's argument that it can arbitrate the second and third causes of action on an individual basis even under this Court's rationale. Instead, Ms. Watts side-steps the issue by claiming that the argument is moot because Century BMW opted not to sever the class action waiver from the arbitration agreement. Century BMW, however, never waived its ability to arbitrate the second and third causes of action on an individual basis. Rather, Century BMW only waived its right to arbitrate on a *class basis*. Because the second and third claims do not arise under the Dealers Act, this Court's decision does not require class arbitration of those causes of action and Century BMW is amenable to arbitrating those claims on an individual basis.

CONCLUSION

For the reasons set forth above, Century BMW respectfully requests that this Court withdraw its opinion, reverse the Circuit Court, and remand with instructions to compel Respondent Watts to arbitrate all of her claims individually.

Respectfully submitted,

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May 28, 2010
Columbia, South Carolina

No.

In the Supreme Court of the United States

SONIC AUTOMOTIVE, 2752 LAURENS RD., GREENVILLE, INC., D/B/A CENTURY BMW, PETITIONER

v.

CHRISTINE WATTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act preempts a state law invalidating a prohibition on class arbitration contained in an arbitration agreement.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Sonic Automotive, 2752 Laurens Rd., Greenville, Inc., doing business as Century BMW. Petitioner is wholly owned by Sonic Automotive, Inc., a publicly held company. Sonic Automotive, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondents are Christine Watts, Natalie Armstrong, Michael Blease, Alison Dannert, Julie Freeman, Heather Herron, Michael Ritz, and Michael Watts.

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SONIC AUTOMOTIVE, 2752 LAURENS RD., GREENVILLE, INC., D/B/A CENTURY BMW, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI

Sonic Automotive, 2752 Laurens Rd., Greenville, Inc., doing business as Century BMW, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of South Carolina in this case.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court (App., *infra*, 1a-12a) is reported at 693 S.E.2d 394. The South Carolina Supreme Court's order denying rehearing (App., *infra*, 13a-15a) and the trial court's order denying petitioner's motion to compel arbitration (App., *infra*, 16a-29a) are unreported.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on April 19, 2010. A petition for rehearing was denied on June 9, 2010 (App., *infra*, 13a-15a). The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a). See *Southland Corp.* v. *Keating*, 465 U.S. 1, 6-8 (1984).

STATUTORY PROVISION INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. 2, provides in relevant part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

1. Petitioner is an automobile dealer in Greenville, South Carolina. In 2005, respondent Christine Watts, accompanied by her father, purchased a 2004 BMW Z4 convertible from petitioner. In the course of doing so, Watts executed an arbitration agreement. Under the terms of that agreement, which was expressly governed by the Federal Arbitration Act (FAA), any dispute between the parties would be subject to arbitration. At Watts's option, the arbitration would take place either in the federal district in which she resided or in the district in which the car was purchased. If Watts initiated the

claim, petitioner agreed to pay the portion of the filing fee that exceeded the amount she would have had to pay if the claim had been filed in court; under the agreement and the underlying rules governing the arbitration, petitioner also agreed to pay the arbitrator's fees. Of critical relevance here, the arbitration agreement provided that the parties "waiv[ed] their right to * * * bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration." App., *infra*, 7a-8a; S.C. C.A. App. 94, 136, 659-666, 1100; Pet. S.C. C.A. Br. 1-7.

2. On October 31, 2006, respondents, including Watts, filed a class action in South Carolina state court against petitioner and more than 300 other automobile dealers. S.C. C.A. App. 68-147. They contended, *inter alia*, that the dealers had improperly charged "administrative fees" in connection with the sale of vehicles in violation of the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act, S.C. Code Ann. §§ 56-15-10 to 56-15-140 (2009).[1]

Pursuant to the terms of the arbitration agreement, petitioner moved to compel arbitration of Watts's claim. The trial court denied the motion. App., *infra*, 16a-29a. The court held that the arbitration agreement was "unconscionable and unenforceable" on the grounds that "[respondent] Watts had an absence of meaningful choice when she entered into the arbitration agreement" and that "[t]he Century BMW arbitration agreement

[1] Because the other respondents besides Watts all purchased vehicles from other dealers besides petitioner, they were nominal parties in the court below and are nominal parties here. See S.C. C.A. App. 135-136.

contains oppressive and one-sided terms." *Id.* at 24a, 28a.

3. Petitioner appealed to the South Carolina Court of Appeals, contending, *inter alia*, that the trial court's order "violated the federal policy favoring arbitration." Pet. S.C. C.A. Br. 11. The South Carolina Supreme Court *sua sponte* certified the appeal for its own review and then affirmed in result. App., *infra*, 1a-12a. As a preliminary matter, the South Carolina Supreme Court agreed with petitioner that the trial court had erred in holding that the arbitration agreement as a whole was unconscionable. *Id.* at 5a-8a. The court first determined that respondent Watts "had a meaningful choice in signing the [arbitration agreement]," because the agreement was "a separate, one-page document" that was "clearly labeled to be an arbitration agreement at the top of the document in bold, capital, and underlined font." *Id.* at 6a. The court further determined that most of the terms of the arbitration agreement were "neither oppressive nor one-sided," because "[s]everal provisions favor the customer" and "nothing in the agreement prevents the arbitrator from awarding punitive damages or * * * limit[s] any available statutory remedies." *Id.* at 8a.

The South Carolina Supreme Court nevertheless held that the provision of the arbitration agreement precluding the availability of class arbitration was invalid on a ground not advanced by respondent Watts: *viz.*, because it violated a provision of the Dealers Act allowing Dealers Act claims to be brought as class actions. See App., *infra*, 9a-10a (citing S.C. Code Ann. § 56-15-110(2) (2009)). Although the provision at issue did not state that the right to file a class action was non-waivable, the court concluded that "the Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits

for violations of the Dealers Act and that any contract prohibiting a class action suit violates our State's public policy and is void and unenforceable." *Id.* at 10a. Because counsel for petitioner had stated at oral argument that petitioner would prefer not to arbitrate rather than to proceed with class arbitration, and because respondent had indicated her desire to "avoid the arbitration agreement and proceed in court," the court invalidated the arbitration agreement in full and therefore affirmed the denial of the motion to compel arbitration. *Id.* at 11a.

4. Shortly after the South Carolina Supreme Court's decision, this Court issued its decision in *Stolt-Nielsen, S.A.* v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), which held that it would be inconsistent with the FAA for an arbitrator to impose class arbitration on parties who had not agreed to authorize it. Petitioner filed a petition for rehearing, contending, *inter alia*, that *Stolt-Nielsen* supported the proposition that the FAA preempted any state law that invalidates a provision of an arbitration agreement precluding the availability of class arbitration. See S.C. S. Ct. Pet. for Reh'g 3 (asserting that "[t]he FAA clearly preempts South Carolina law, as this Court construed it").

The South Carolina Supreme Court denied the petition. App., *infra*, 13a-15a. The court did not expressly address petitioner's preemption argument, other than to state that *Stolt-Nielsen* was "distinguishable on the law and the facts." *Id.* at 15a. Instead, the court simply reiterated that "[its] opinion affirming the trial court's denial of the motion to compel arbitration [was] wholly based on state law grounds, namely a provision in a contract banning class action suits is invalid pursuant to the Dealer[s] Act and the public policy of this State." *Ibid.* Although the court had held that the provision of the arbitration agreement precluding the availability of class

arbitration was invalid, the court asserted that it had "not condition[ed] the enforcement of the agreement on the availability of class arbitration or otherwise indicate[d] the plaintiffs could proceed as a class in arbitration." *Ibid.*

REASONS FOR GRANTING THE PETITION

In the decision below, the South Carolina Supreme Court held that, notwithstanding the Federal Arbitration Act, state law could invalidate a provision of an arbitration agreement precluding the availability of class arbitration. After petitioner filed its petition for rehearing in the South Carolina Supreme Court, this Court granted the petition for certiorari in *AT&T Mobility LLC* v. *Concepcion*, No. 09-893 (May 24, 2010), which presents the question whether the FAA preempts a state-law rule—there, a rule derived from the common-law doctrine of unconscionability—that conditions the enforceability of an arbitration agreement on the availability of class arbitration. Because the question presented in this case is materially identical to the question presented in *AT&T Mobility*, the petition in this case should be held pending the Court's disposition of *AT&T Mobility*, and then disposed of accordingly.

1. In *AT&T Mobility*, as in this case, the defendant moved to compel arbitration based on an arbitration provision that contained a prohibition on class arbitration; the plaintiff opposed the motion on the ground that the arbitration provision was unconscionable under state law. See Pet. App. at 3a-4a, *AT&T Mobility*, *supra*. The Ninth Circuit upheld the district court's denial of the motion to compel arbitration, holding, first, that the arbitration provision was unconscionable because it was effectively exculpatory, see *id.* at 11a, and second, that the resulting state-law rule was not preempted by the FAA

because it was "simply a refinement of the unconscionability analysis applicable to contracts generally in California," *id.* at 12a-13a. Although this Court's intervening decision in *Stolt-Nielsen* strongly suggested that the Ninth Circuit's decision was incorrect, the Court granted the petition in *AT&T Mobility* and set the case for briefing and oral argument.

2. The South Carolina Supreme Court's decision in this case is erroneous for largely the same reasons as the Ninth Circuit's decision in *AT&T Mobility*. In each case, the practical effect of the lower court's decision is the same: *viz.*, to render it impossible, as a matter of state law, for parties to agree to commit claims to bilateral arbitration (and thereby to preclude plaintiffs from pursuing claims on behalf of unnamed third parties). Various provisions of the FAA—including, most notably, Section 2—make clear that there is a strong federal policy to "ensure that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen*, 130 S. Ct. at 1773 (internal quotation marks and citation omitted). To be sure, Section 2 contains a narrow exception under which courts may invalidate arbitration provisions "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. As in *AT&T Mobility*, however, the state-law rule at issue here does not qualify as a valid ground for invoking that exception because it is aimed specifically at dispute-resolution agreements. See Pet. Br. at 26-48, *AT&T Mobility*, *supra*. The state-law rule is also preempted because it conflicts with broader policies animating the FAA: *viz.*, the federal policies of removing impediments to arbitration

and allowing parties to select their own dispute-resolution mechanisms. See *id.* at 49-56.[2]

3. Given the substantial overlap between the questions presented in this case and in *AT&T Mobility*, the Court should hold the petition in this case pending its disposition of *AT&T Mobility*. Should the Court hold in *AT&T Mobility* that the state-law rule at issue is preempted, there would be no valid basis for reaching a different conclusion in this case. The appropriate course would therefore be for the Court to vacate the judgment below and remand, so as to allow the South Carolina state courts to compel arbitration of respondent's claims.

Conversely, even if the Court were to affirm in *AT&T Mobility*, it may still be appropriate for the Court to vacate and remand in this case, depending on the reasoning the Court uses in reaching that result. This case presents a more compelling case for federal preemption than *AT&T Mobility* in one potentially significant re-

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[2] Relying on this Court's recent decision in *Stolt-Nielsen*, petitioner advanced its preemption argument as one of its primary bases for rehearing in the South Carolina Supreme Court. See, *e g*, S.C S. Ct. Pet. for Reh'g 3. Curiously, in its order denying rehearing, the South Carolina Supreme Court did not expressly address that argument, beyond its apodictic statement that *Stolt-Nielsen* was "distinguishable on the law and the facts." App., *infra*, 15a. Instead, it stated that, in its earlier opinion, it had "not condition[ed] the enforcement of the agreement on the availability of class arbitration or otherwise indicate[d] the plaintiffs could proceed as a class in arbitration" *Ibid* That statement, however, is utterly bewildering in light of the court's earlier opinion. There, the court squarely and unambiguously held that, in light of the invalidity of the prohibition against classwide arbitration, the only possible remedies were to sever the prohibition (and thereby permit respondent Watts to pursue classwide arbitration) or, as the court ultimately did, to invalidate the arbitration agreement entirely. See *id* at 10a-12a.

spect. Unlike the state-law rule invalidating provisions requiring bilateral arbitration in *AT&T Mobility*—which was at least purportedly derived from the generally applicable common-law doctrine of unconscionability, see Pet. App. at 12a-13a, *AT&T Mobility*, *supra*—the South Carolina Supreme Court *refused* to derive its state-law rule from that doctrine, and instead relied on a novel interpretation of a provision of the South Carolina Dealers Act. See App., *infra*, 9a-10a. Under that interpretation, the provision invalidates provisions prohibiting class treatment only of a *specific class* of claims against automobile dealers (whether in arbitration or in litigation). See *ibid.* Should the Court conclude in *AT&T Mobility*, therefore, that the state-law rule at issue qualifies for the exception to preemption in Section 2 of the FAA for cases involving generally applicable principles of contract law, it would still be appropriate for the Court to vacate the judgment below and remand, because the Court's reasoning in *AT&T Mobility* would not necessarily dictate the outcome here.

In either event, it is clear that the decision in *AT&T Mobility* will have a direct and potentially dispositive effect on the preemption argument presented in this case. For that reason, consistent with the Court's ordinary practice, a hold for *AT&T Mobility* is warranted.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *AT&T Mobility LLC* v. *Concepcion*, No. 09-893, and then disposed of accordingly.

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APPENDIX

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APPENDIX A

SUPREME COURT OF SOUTH CAROLINA

No. 26805

HEATHER HERRON, NATALIE ARMSTRONG, MICHAEL RITZ, JULIE FREEMAN, CHRISTINE WATTS, ALISON DANNERT, MICHAEL BLEASE, MICHAEL WATTS, INDIVIDUALLY AND FOR THE BENEFIT OF ALL CAR BUYERS WHO PAID "ADMINISTRATIVE FEES" AS DESCRIBED BELOW TO DEFENDANTS, Respondents,

v.

CENTURY BMW A/K/A SONIC AUTOMOTIVE; DICK DYER & ASSOCIATES, INC.; GALEANA CHRYSLER PLYMOUTH, INC., A/K/A GALEANA CHRYSLER JEEP, INC.; J.L.H. INVESTMENTS LP A/K/A HENDRICK HONDA; OVERLAND, INC., D/B/A LAND ROVER OF COLUMBIA; TAYLOR TOYOTA A/K/A TAYLOR INVESTMENTS; AND TOYOTA OF GREENVILLE, INC. ET AL., Defendants,

of whom CENTURY BMW A/K/A SONIC AUTOMOTIVE, Appellant.

Heard Jan. 20, 2010
Decided April 19, 2010
Rehearing Denied June 9, 2010

(1a)

Before TOAL, Chief Judge, BEATTY, and HEARN, Justices, and MOORE, Acting Justice.

KITTREDGE, Justice.

This case concerns the enforceability of an arbitration agreement. Respondents Christine and Michael Watts entered into a contract with Appellant Century BMW (Century) for the purchase of a car. The transaction included the execution of an arbitration agreement. Subsequently, the Wattses filed a class action suit against Century alleging the dealership had charged illegal administrative fees. Century moved to compel arbitration. The trial court found the arbitration agreement was unconscionable and unenforceable and denied the motion to compel. Century appealed, and we granted certification pursuant to Rule 204, SCACR.

We hold the arbitration agreement, although an adhesion contract, is not unconscionable. Yet the arbitration provision prohibiting class actions is against public policy, which would ordinarily be severed pursuant to the agreement's severance clause. Century has insisted, however, that if the class action prohibition provision is unenforceable, it will abandon the balance of its rights under the arbitration agreement and consent to the action proceeding in the trial court. Although the arbitration agreement is otherwise enforceable, in accordance with Century's request, we affirm in result the trial court's order denying the motion to compel arbitration.

I.

In 2005, Michael Watts began looking for a car to purchase for his daughter, Christine Watts, as a graduation present. He negotiated with Century for the sale of a 2004 BMW Z4 convertible. Michael gave Century a bottom line price of $32,000, which Century initially re-

jected, but ultimately accepted. On the day of sale, Century presented a packet of documents Michael and Christine were to sign. Within the packet was a document titled "***ARBITRATION AGREEMENT.***" The arbitration agreement provided that any dispute between the parties would be subject to arbitration[1] and that the agreement was governed by the Federal Arbitration Act (FAA). The agreement further provided that the parties were waiving their right to bring or participate in a class action suit.

The Wattses brought a class action suit against Century and numerous other car dealerships in South Carolina, alleging the dealers charged an illegal administrative fee in violation of the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act ("Dealers Act"). S.C.Code Ann. § 56-15-10 *et seq.* (2005). Century filed a motion to compel arbitration pursuant to the terms of the agreement. Relying heavily on *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 644 S.E.2d 663 (2007), the trial court found the arbitration agreement was unconscionable because there was an absence of a meaningful choice and the agreement contained oppressive and one-sided terms. Accordingly, the trial court found the arbitration agreement was unenforceable and denied Century's motion to compel.

II.

A.

Arbitration

The question of arbitrability of a claim is an issue for the courts. *Partain v. Upstate Automotive Group,* 386 S.C. 488, 689 S.E.2d 602 (2010) (Shearouse Adv. Sh. No.

[1] The Wattses have never contended that this dispute is not within the scope of the arbitration agreement.

6 at 28). The determination of whether a claim is subject to arbitration is subject to de novo review, but a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Id.*

At the outset, we recognize that there is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes. *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995). At the same time, general contract principles of state law apply to a court's evaluation of the enforceability of an arbitration clause governed by the FAA. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001) (citing *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 685 (1996)). To this end, if a court as a matter of law finds any clause of a contract involving the sale of goods to have been unconscionable at the time it was made, the court may refuse to enforce the unconscionable clause, or so limit its application so as to avoid any unconscionable result. S.C. Code Ann. § 36-2-302(1) (2003).

B.

Adhesion Contract

The Wattses and Century dispute whether this contract is an adhesion contract. Century argues the transaction was thoroughly negotiated and the sale was not conditioned upon the Wattses agreeing to sign the arbitration agreement. The Wattses, on the other hand, argue there is evidence to support the trial court's finding that this was an adhesion contract, including the fact that this was a standard form contract. It appears that one customer (and certainly no more than a few customers) out of approximately six thousand failed to sign the arbitration agreement.

We agree with the trial court that this is an adhesion contract. This was a contract on a standard form, presented on a take-it-or-leave-it basis. The Wattses did not contribute to the drafting of the contract or possess the bargaining power to negotiate the terms of the contract.[2] *See Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 394, 498 S.E.2d 898, 901 (Ct. App. 1998) (recognizing a contract of adhesion is generally thought of as a standard form contract, offered on a take-it-or-leave-it basis, containing non-negotiable terms). Nevertheless, although this Court has approached adhesion contracts between a consumer and automobile retailer with "considerable skepticism," adhesion contracts are not per se unconscionable. *Simpson*, 373 S.C. at 27, 644 S.E.2d at 669. Finding a contract to be one of adhesion is merely the beginning point in the analysis of whether the contract is unconscionable. *Lackey*, 330 S.C. at 395, 498 S.E.2d at 902.

C.

Unconscionability

In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party, due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them. *Simpson*, 373 S.C. at 25, 644 S.E.2d at 668.

1. Absence of Meaningful Choice

Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. *Id.* at 25, 644

[2] Although the Wattses negotiated the *price of the car*, they did not have the power to negotiate the *terms of the contract*

S.E.2d at 669. In determining whether there is an absence of a meaningful choice, courts consider the relative disparity in the parties' bargaining power; the parties' relative sophistication; the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause. *Id.*

We are firmly convinced and find the Wattses had a meaningful choice in signing the contract. We recognize that this was a contract for the sale of a vehicle Christine Watts planned to use as her primary means of transportation, "which is critically important in modern day society." *Id.* at 27, 644 S.E.2d at 670. We also recognize that there was an inherent disparity in bargaining power between the parties, as this was a transaction between a consumer and a commercial entity.[3] However, the arbitration agreement is a separate, one-page document which both Michael and Christine Watts signed. It is clearly labeled to be an arbitration agreement at the top of the document in bold, capital, and underlined font. The important terms and provisions of the agreement appear in the body of the contract and again in capital letters just above the signature line.

The Wattses both admitted they did not read the arbitration agreement, and their deposition testimony confirmed the failure to read the documents was solely attributed to them and not to Century's actions. Our jurisprudence forbids us to allow the Wattses to invalidate the enforceability of the arbitration agreement by claim-

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[3] Contrary to Century's assertion, we find no significance in the fact that this was a luxury vehicle or that Christine Watts was "highly-educated." These factors do not change the "consumer/business nature" of the transaction.

ing they did not read it. *Regions Bank v. Schmauch*, 354 S.C. 648, 663, 582 S.E.2d 432, 440 (Ct. App. 2003) (citing *Sims v. Tyler*, 276 S.C. 640, 643, 281 S.E.2d 229, 230 (1981)) ("A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it.").

This arbitration agreement and the actions of Century surrounding the transaction are markedly different from the actual agreement as well as surrounding circumstances in *Simpson*. The *Simpson* arbitration agreement was inconspicuously buried in the sales contract, on the opposite page from the customer's signature, in paragraph "10" of sixteen other paragraphs. Additionally, the *Simpson* customer alleged the contract was "hastily" presented for her signature.

The significant features that impacted the unconscionability determination in *Simpson* are not present here. We hold the Wattses had a meaningful choice in making the decision to enter into this contract with Century.

2. Oppressive One-Sided Terms

First, we will address the provisions in the arbitration agreement, save for the provision prohibiting a customer from bringing a class action suit against Century.

Under the agreement, all claims must be brought within the applicable statute of limitations, the arbitrator shall be an attorney or retired judge, and each party is responsible for his or her own attorney's fees. Additional terms include: no arbitration is required if the claim is brought in small claims court; the arbitration shall be conducted, at the customer's option, in the federal district in which the customer resides or in which the vehicle was purchased; the arbitrator shall apply governing local, state or federal laws and award damages or other relief allowed by such governing laws; if the customer

initiates a claim, Century will pay the portion of the filing fee which exceeds the court filing fee; if Century initiates the claim, it will pay the entire filing fee; Century will pay up to $1,500 of the arbitrator's fees; and parties shall equally share fees in excess of $1,500.

In our view, these terms are neither oppressive nor one-sided. Moreover, nothing in the agreement prevents the arbitrator from awarding punitive damages or double or treble compensatory damages, nor does the agreement limit any available statutory remedies. Several provisions favor the customer, such as allowing the customer a choice of venue and Century's obligation to pay certain fees. Moreover, both the customer and Century are subject to the same terms in the arbitration agreement, thus there is no lack of mutuality of remedy. *See Simpson,* 373 S.C. at 32, 644 S.E.2d at 672 (adhering to previous holdings in that lack of mutuality of remedy will not invalidate an arbitration agreement, but finding the provision dictating that the dealer's judicial remedies supersede the consumer's arbitral remedies was one-sided and oppressive).

These terms stand in sharp contrast to the terms present in *Simpson.* In *Simpson,* the arbitration provision required the customer to waive her right to mandatory statutory remedies, including the right to punitive damages and double and treble compensatory damages. There was a lack of mutuality of remedies, as the customer was forced to arbitrate all claims she may have had against the dealer, while the dealer reserved its right to judicial remedies in certain circumstances. Further, the scope of the arbitration agreement in *Simpson* was so broad it included non-arbitratable disputes.[4]

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[4] The Court found the scope of the arbitration agreement was broad enough to implicate claims arising under the Magnuson-Moss

3. Ban on Class Actions

Finding the terms in the arbitration agreement not to be oppressive or one-sided, we next turn to the provision banning class action suits. This provision provides: "By entering into this Agreement the Parties are waiving their right to . . . bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration." The Wattses argue this provision is unenforceable because it is oppressive in that it takes away statutory rights, and it is one-sided in that Century would not bring a class action suit against its customers. While we agree with the Wattses that the provision is unenforceable, we hold the ban on class actions is unenforceable on public policy grounds.

The purpose of the Dealers Act is consumer protection. Damages are typically small in individual consumer cases, thereby discouraging plaintiffs from bringing individual actions. Our Legislature recognized this and expressly provided plaintiffs with the right to bring class action lawsuits for violations of the Dealers Act:

> When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief.

Warranty Act (MMWA), a federal statute that governs warranties on consumer products The Court noted that federal regulations state that informal dispute resolution procedures set forth in written warranties under the MMWA are not to be legally binding on any person. 16 C.F.R. § 703 5(j) (2006) Accordingly, the Court held "the inclusion of the MMWA in the scope of the arbitration clause is unenforceable as a matter of public policy." *Simpson*, 373 S.C. at 33, 644 S.E.2d at 673.

Section 56-15-110(2). The Dealers Act further provides: "Any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable." Section 56-15-130.

Stated succinctly, the Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act and that any contract prohibiting a class action suit violates our State's public policy and is void and unenforceable. We note that courts across the country are split over whether an arbitration agreement may include a waiver of the right to bring a class action suit. *See Scott v. Cingular Wireless,* 161 P.3d 1000, 1004 (Wash. 2007) (highlighting the split in authority with a list of nationwide cases finding class action waivers enforceable and unenforceable). We are guided by our state law, and the unmistakable statutory language contained in the Dealers Act indicating our Legislature intended for this to be a non-waivable right. We therefore hold this provision is unenforceable on public policy grounds. *See Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 361 S.C. 544, 555, 606 S.E.2d 752, 758 (2004) (holding the general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution).

4. Severance

Finding this provision unenforceable would normally not end the inquiry on the enforceability of the remainder of the contract, as courts will attempt to sever an illegal provision in an otherwise valid contract and enforce

the remaining terms.[5] The parties' arbitration agreement provides that "[i]f any part of this Agreement shall be deemed or found unenforceable for any reason, the remainder of the Agreement shall remain enforceable."

Nevertheless, counsel for Century unambiguously stated at oral argument that Century did not wish to invoke the severance clause and sever the provision banning class actions from the remainder of the agreement. Century unequivocally expressed its intent for the arbitration agreement to stand or fall as a whole. Obviously, the Wattses seek to avoid the arbitration agreement and proceed in court. We will not provide a remedy that neither party seeks. We treat the issue of severability as abandoned. Therefore, we decline to enforce the arbitration agreement and affirm in result the trial court's denial of Century's motion to compel arbitration.

III.

We hold, except for the provision prohibiting customers from bringing class actions, the arbitration agreement is not unconscionable, for the Wattses had a meaningful choice in entering this agreement and the agreement does not contain oppressive or one-sided terms. The arbitration agreement is enforceable except for the ban on class actions, which, under ordinary circumstances, would be severed. However, Century has abandoned its right to severance and seeks to litigate this matter in court if the ban on class actions is unenfor-

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[5] A severable contract is one in its nature and purpose susceptible of division and apportionment, with an emphasis on discerning the parties' intent. *Columbia Architectural Group, Inc v Barker*, 274 S.C. 639, 641, 266 S.E.2d 428, 429 (1980) Whether an illegal provision in an otherwise valid contract may be severed from the contract is a matter of the intent of the parties. *Beach Co v Twillman, Ltd*, 351 S.C. 56, 64, 566 S.E.2d 863, 867 (Ct. App. 2002).

ceable. Accordingly, we affirm in result the trial court's order denying the motion to compel arbitration.

AFFIRMED IN RESULT.

APPENDIX B

SUPREME COURT OF SOUTH CAROLINA

HEATHER HERRON, NATALIE ARMSTRONG, MICHAEL RITZ, JULIE FREEMAN, CHRISTINE WATTS, ALISON DANNERT, MICHAEL BLEASE, MICHAEL WATTS, INDIVIDUALLY AND FOR THE BENEFIT OF ALL CAR BUYERS WHO PAID "ADMINISTRATIVE FEES" AS DESCRIBED BELOW TO DEFENDANTS, Respondents,

v.

CENTURY BMW A/K/A SONIC AUTOMOTIVE; DICK DYER & ASSOCIATES, INC.; GALEANA CHRYSLER PLYMOUTH, INC., A/K/A GALEANA CHRYSLER JEEP, INC.; J.L.H. INVESTMENTS LP A/K/A HENDRICK HONDA; OVERLAND, INC., D/B/A LAND ROVER OF COLUMBIA; TAYLOR TOYOTA A/K/A TAYLOR INVESTMENTS, AND TOYOTA OF GREENVILLE, INC. ET AL., Defendants,
of whom CENTURY BMW A/K/A SONIC AUTOMOTIVE, Appellant.

June 9, 2010

ORDER

Before TOAL, Chief Justice; BEATTY, HEARN, and KITTREDGE, Justices; and MOORE, Acting Justice.

On April 19, 2010, we issued our opinion in *Herron* v. *Century BMW,* Shearouse Adv. Sh. No. 15 at 14 (April 19, 2010), in which we affirmed the trial court's denial of Century's motion to compel arbitration. Although we found the arbitration agreement was not unconscionable, we held the provision banning class actions was invalid on state law grounds.

Specifically, we held:

> [T]he Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act and that any contract prohibiting a class action suit violates our State's public policy and is void and unenforceable.

Although the arbitration agreement contained a severance clause, at oral argument, counsel for Century adamantly insisted it was their position that the severance clause not be invoked to sever the provision and repeatedly requested the Court to consider the arbitration as a whole. In honoring Century's position and request, we held the inclusion of the provision banning class action suits rendered the arbitration agreement unenforceable.

Eight days after we issued our opinion, the United States Supreme Court issued *Stolt-Nielsen* S.A. v. *AnimalFeeds Int'l Corp.,* 130 S. Ct. 1758 (2010), in which the Supreme Court held a party cannot be compelled to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. Century has now filed a petition for rehearing. Century asserts "[t]his Court held that Century BMW could not arbitrate unless it did so as part of a class arbitration," and

argues such a holding is contrary to the holding in *Stolt-Nielsen.*

We deny Century's petition for rehearing. Our opinion affirming the trial court's denial of the motion to compel arbitration is wholly based on state law grounds, namely a provision in a contract banning class action suits is invalid pursuant to the Dealer's Act and the public policy of this State. Although we would have looked to the severance clause of the agreement to sever this invalid provision, Century unequivocally insisted we consider the arbitration agreement as a whole, which we did. Century's attempt to depict our opinion as holding "that Century BMW could not arbitrate unless it did so as part of a class arbitration" is disingenuous to the opinion and a holding we never made. We did not condition the enforcement of the arbitration agreement on the availability of class arbitration or otherwise indicate the plaintiffs could proceed as a class in arbitration. This case is not controlled by *Stolt-Nielsen,* for is distinguishable on the law and the facts.

For these reasons, we deny Century's petition for rehearing.

IT IS SO ORDERED.

APPENDIX C

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

No. 06-CP-02-1230

HEATHER HERRON, NATALIE ARMSTRONG, MICHAEL RITZ, JULIE FREEMAN, CHRISTINE WATTS, ALISON DANNERT, MICHAEL BLEASE, MICHAEL WATTS, INDIVIDUALLY AND FOR THE BENEFIT OF ALL CAR BUYERS WHOM PAID "ADMINISTRATIVE FEES" AS DESCRIBED BELOW TO DEFENDANTS, Plaintiffs,

v.

CENTURY BMW A/K/A SONIC AUTOMOTIVE; DICK DYER & ASSOCIATES, INC.; GALEANA CHRYSLER PLYMOUTH, INC. A/K/A GAJEANA CHRYSLER JEEP, INC.; .T.L.H. INVESTMENTS, LP A/K/A HENDRICKS HONDA; OVERLAND, INC. D/B/A LAND ROVER OF COLUMBIA; TAYLOR TOYOTA A/K/A TAYLOR INVESTMENTS; AND TOYOTA OF GREENVILLE, INC., ET. AL., Defendants.

March 10, 2008

ORDER DENYING MOTION TO COMPEL ARBITRATION

EARLY, Circuit Court Judge.

This matter comes before the Court by way of Century BMW a/k/a Sonic Automotive's ("Century BMW's") Motion to Compel Arbitration. This motion was argued before me on November 30, 2007. After considering the parties' filings, as well as the memoranda and legal arguments of counsel, I have determined that the Motion to Compel Arbitration should be denied.

FACTUAL BACKGROUND

On January 25, 2005, Plaintiff Christine Watts, a twenty-four year old college student, and her father, Michael Watts, a garage door salesman, purchased a car from Defendant Century BMW. The vehicle was a graduation present for Ms. Watts. The car was purchased to be Ms. Watts's primary source of transportation and was needed so that she could get back and forth to work.

After the parties agreed to a price for the car, Century BMW's F&I manager took Ms. Watts and her father into a cubicle to sign paperwork. Christine Watts in her affidavit stated that the documents were "hastily presented." Century BMW refers to this process as "rolling out the paper."

The Wattses say they were presented with a big packet of documents containing flags indicating where the Wattses were supposed to sign. Century BMW's General Manager testified that it was the F&I manager's custom to place his finger on the individual documents pointing to the place on the documents that needed to be signed and say "sign here."

The Wattses signed multiple documents. Some of the documents were required to be signed by law.

The arbitration agreement at issue was one of the documents included in the packet. This arbitration

agreement is a form contract drafted by Century BMW. The arbitration agreement uses a small font.

The Wattses say there was no discussion with the F&I manager about the arbitration agreement. Century BMW's General Manager did not know what was discussed with the Wattses but stated that he would expect his people to tell the customer that the agreement is "a document providing a remedy for the customer without having to go to court." The Wattses also testified that believed that they were required to sign all of the documents in order to get the car.

On October 31, 2006, Plaintiff Watts initiated the current action against Defendant Century BMW. In the Amended Complaint, Plaintiff Watts alleged causes of action for a declaratory judgment, civil conspiracy, and violation of the Motor Vehicle Dealers Act. On December 29, 2006, Defendant Century BMW filed a motion to compel arbitration.

ANALYSIS

The Plaintiff and Defendant agree that *Simpson v. MSA of Myrtle Beach Inc.*, 644 S.E.2d 663 (S.C. 2007) is the controlling authority for this motion. The *Simpson* Court held that a car dealer's attempt in a form contract to prevent a consumer from prosecuting statutory rights in arbitration was unconscionable and unenforceable. *Simpson*, 644 S.E.2d at 668-671. Application of the *Simpson* test here shows that the Century BMW arbitration agreement is also unconscionable and unenforceable.

A. The Century BMW Arbitration is an Adhesion Contract.

The Century BMW arbitration agreement is an adhesion contract. "[A]n adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." *Simpson*, 644 S.E.2d at

669. Adhesion contracts "are standard in the automobile retail industry." *Id.*

The arbitration agreement here is a standard form contract drafted by Century BMW. The contract has only blanks that can be filled in depending on the date of the transaction, the VIN number of the vehicle, the name of the customer, and the name of the dealership. Plaintiff Watts did not participate in the drafting of the agreement and had no voice in the formulation of its terms.

Century BMW presents the arbitration agreement on a take-it-or-leave-it basis. Century BMW's procedures and method of presentation lead to the conclusion that the arbitration agreement must be signed to purchase the car. Century BMW's General Manager stated that the F&I Manager's "practice" was to present the individual documents and point to on the paper to where the customer was supposed to sign and say "sign here." Century BMW had no standard statements to tell purchasers. This practice indicates that signing the document is required in order to purchase a car. This conclusion is further supported by the fact that in over 6,000 transactions, the only person the General Manager could name who ever bought a car without signing the arbitration agreement was Brad Martin, Esq., a lawyer in this case.

The agreement is a standard form contract. Century BMW's procedures and the Watts's testimony[1] show that

[1] The Wattses' testimony is the only testimony about the events surrounding the execution of the agreement. The Wattses testified they believed they were required to sign the agreement in order to get the car. Century BMW was unable to produce any witness whom remembered the transaction.

the terms of the arbitration agreement were not negotiable. Accordingly, I find that the arbitration agreement is an adhesion contract. Because the Century BMW arbitration agreement is an adhesion contract, the Century BMW arbitration agreement should be viewed with "considerable skepticism." *Simpson*, 644 S.E.2d at 670 (adopting rationale of Ohio Courts in analyzing arbitration agreements by automobile retailers and stating "We . . . proceed to analyze this contract between a consumer and automobile retailer with 'considerable skepticism'.").

B. Absence of Meaningful Choice.

I also find that there was an absence of meaningful choice in agreeing to arbitrate and waive the statutory right to participate in a multi-plaintiff action. The *Simpson* case describes absence of meaningful choice as follows:

> Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue. In determining whether a contract was "tainted by an absence of meaningful choice," courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.

Simpson v. MSA of Myrtle Beach Inc., 644 S.E.2d 663 (internal citation omitted).

Because an automobile is a "necessity" in everyday life, the *Simpson* Court found this factor should be con-

sidered in determining "whether a consumer had a meaningful choice in negotiating the arbitration agreement." *Simpson*, 644 S.E.2d at 669.

Applying this analysis, the *Simpson* Court provided as follow:

> [T]he contract between Simpson and Addy involved a vehicle intended for use as Simpson's primary transportation, which is critically important in modem day society. Applying the factors considered by the Fourth Circuit in analyzing arbitration clauses, we also acknowledge Simpson's claim that she did not possess the business judgment necessary to make her aware of the implications of the arbitration agreement, and that she did not have a lawyer present to provide any assistance in the matter. *But see Munoz*, 343 S.C. 531, 542 S.E.2d 360 (failing to factor in the weaker party's status as a consumer in analyzing an unconscionability claim in an arbitration agreement between a consumer and a lender). Similarly, we note that Simpson's allegation that the contract was "hastily" presented for her signature.

Simpson, 644 S.E.2d at 670. The facts here support a finding of an absence of meaningful choice by the Plaintiffs.

There was a clear disparity in the parties' bargaining power and the relative sophistication between the parties. Century BMW argues that Ms. Watts is sophisticated because in 2008 she works as an auditor. However, in 2005, when the vehicle was purchased, Ms. Watts was a student at the College of Charleston. Michael Watts sold garage doors. The Wattses did not have any attorney present when they signed the agreement. The Plain-

tiffs were not sophisticated and obviously not substantial business concerns.

Century BMW, on the other hand, is owned by Sonic Automotive, Inc., a large corporation that owns dozens of cars dealerships. Sonic Automotive, Inc. drafted the arbitration agreement and had engaged in thousands of transactions where arbitration clauses were used. Sonic was a sophisticated car dealer with years of arbitration clause use. I find that there was a disparity of bargaining power between the parties.

Additionally, there was unfairness in the bargaining process. Century BMW inconspicuously placed the arbitration agreement within a series of documents that included documents that were required to be signed by law and then had its F&I Manager point on each document (whether required to be signed by law or not) and say sign here. There was nothing telling the Wattses that the arbitration agreement, unlike the documents required to be signed by law was not mandatory. This procedure indicates that signing all of the documents is mandatory and is indicative of unfairness in the bargaining process. *Simpson*, 644 S.E.2d at 669 ("Absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue.").

The Watts stated that there was no discussion of the arbitration agreement. Century BMW's General Manager did not know what was discussed with the Wattses but stated that he would expect his people to tell the customer that the agreement is "a document providing a remedy for the customer without having to go to court." This statement, if given by Century BMW, is sorely lacking because the arbitration agreement in actuality takes away remedies and statutory rights. The lack of a Cen-

tury BMW full explanation is further evidence showing the fundamental unfairness of the bargaining process.

There was also an element of surprise involved in the inclusion of the arbitration agreement because none of the signatories of the arbitration agreement (the Wattses nor the F&I manager) understood what they were signing. Neither of the Wattses had ever participated in an arbitration nor had any understanding of arbitration. Similarly, Century BMW's General Manager and F&I manager did not have much understanding of the arbitration agreement nor how it worked.

Century BMW's argument that the bargaining process was fair because the Wattses could have read the arbitration agreement is non-availing. The Plaintiff in *Simpson* also could have read the arbitration agreement at issue in that case. Additionally, even if the Wattses had read the arbitration agreement, the bargaining process was unfair because the arbitration agreement was not easily understandable.

Century BMW's Rule 30(b)(6) representative as the person most knowledgeable on the arbitration agreement testified that he did not have much understanding of how the arbitration agreement worked. Century BMW's General Manager has thirty-two years worth of experience in the car industry, has dealt with the subject arbitration agreement since 2002, and does not understand the arbitration agreement. Similarly, the F&I manager, whom presented the arbitration agreement to the Wattses, does not have much understanding of the agreement. It is unfair to expect the Wattses to understand the agreement, when in a little cubicle with the F&I Manager with his finger on the document pointing to the place to sign.

I also find that use of the car was a necessity to Ms. Watts. The car was purchased to be Ms. Watts's primary

source of transportation and was purchased so that she could get back and forth from work. Century BMW argues that the vehicle was not necessity because Christine Watts previously owned a Mitsubishi Montero. The fact that Ms. Watts previously owned another vehicle does not defeat the fact that use of a car is a necessity. The plaintiff in *Simpson*, prior to purchasing the car in that case, owned a 2001 Toyota 4-Runner and the South Carolina Supreme Court expressly found that the car purchased was a necessity. *Simpson*, 644 S.E.2d at 663. The car purchased by Ms. Watts, like the car purchased in *Simpson*, was purchased to be her primary source of transportation. As such, I find that the use of the car was a necessity.

In the end, I find that the facts in this case are similar to those in *Simpson*. These facts, just as they did in Simpson, warrant a finding that Plaintiff Watts had an absence of meaningful choice when she entered into the arbitration agreement.[2]

C. One-Sided and Oppressive Terms.

The Century BMW arbitration agreement contains oppressive and one-sided terms. In analyzing this factor, the *Simpson* Court stated:

> The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution. *Carolina Care Plan*, 631 S.C. at 555, 606 S.E.2d at

[2] In addition to *Simpson*, the North Carolina Supreme Court's decision in *Tillman v Commercial Credit Loans, Inc.*, 655 S.E.2d 362 (N.C. 2008) also supports a finding that the arbitration agreement here is unenforceable.

> 758. In our opinion, this rule has two applications in the present case. First, this arbitration clause violates statutory law because it prevents Simpson from receiving the mandatory statutory remedies to which she may be entitled in her underlying SCUTPA and Dealers Act claims. Second, unconditionally permitting the weaker party to waive these statutory remedies pursuant to an adhesion contract runs contrary to the underlying statutes' very purposes of punishing acts that adversely affect the public interest. Therefore, under the general rule, this provision in the arbitration clause is unenforceable.

Simpson, 644 S.E.2d at 671 (citing the "strong public policy notions behind the enactment of the . . . Dealers Act."). The *Simpson* case reasoning is equally applicable here.

One-Sided Terms

The prohibition of multi-plaintiff and class action in the Century BMW arbitration agreement is one-sided. Although styled as a mutual prohibition on representative class actions, it is difficult to envision the circumstances on which the provision might negatively impact Century BMW, because car dealers typically do not sue their customers in class action lawsuits. Such a one-sided contract is unconscionable. *See Kinkel v. Cingular Wireless. LLC*, 828 N.E.2d 812, 820-821 (Ill. App. 5 Dist. 2005)("cellular telephone service providers typically do not sue their customers in class action lawsuits. Thus, Cingular's provision barring class arbitration is a one-sided limitation on its customers' ability to seek relief . . . such a one-sided limitation that could effectively deny plaintiffs their day in court is substantively unconsciona-

ble."). *See also Szetela v. Discover Bank*, 97 Cal.App. 4th 1094 (2002)(Holding a similar clause unconscionable and one-sided because "credit card companies typically do not sue their customers in class action lawsuits."). Clearly, the Century BMW arbitration agreement contains one-sided terms.

Oppressive Terms

The arbitration agreement contains oppressive terms that violate public policy and statutory law. The Century BMW arbitration agreement here, like the arbitration agreement in *Simpson*, attempts to take away Plaintiff Watts's statutory rights. The Dealers Act provides substantive rights to those harmed by violations. S.C. Code Ann. §56-15-110(2) provides:

> (2) When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for benefit of the whole. Including actions for injunctive relief.

S.C. Code Ann. §56-15-110(2) provides statutory rights to plaintiffs including the right to bring a claim on behalf of a group and injunctive relief on behalf of a group. The statute was "[o]bviously enacted . . . because consumers' remedies at common law were deemed inadequate." *See Kucharski v. Rick Hendrick Chevrolet, LP*, 2002 WL 313860990 (S.C. Ct. App. 2002). As stated by the Supreme Court in *Simpson*, the purpose behind the Dealers Act is to "punish[ ] acts that adversely affect the public interest." *Simpson*, 644 S.E.2d at 671.

The Century BMW arbitration agreement's attempted prohibition of group suits prevents Plaintiff Christine Watts from effectively vindicating her statuto-

ry rights in arbitration. The right to bring a claim on behalf of a group under S.C. Code Ann. §56-15-110(2) is significant. This protection is necessary because otherwise parties with nominal individual claims, but significant collective claims, would be left with limited avenues for relief and a wrongdoer car dealer with little checks on its abuses of law. S.C. Code Ann. §56-15-110 makes it economical for a car purchaser who has been harmed by violation of the statute to bring claims against a car dealer. Century BMW's attempt to take this right away is violative public policy.

Similarly, Plaintiff Christine Watts's statutory right, as one harmed Plaintiff, to seek *group injunctive relief*, when an action is of common or general interest to many persons, cannot be effectively vindicated under the Century BMW arbitration Agreement. S.C. Code Ann. §56-15-110(2) is designed so that one person can stop a car dealers from perpetrating wrongdoing against many car purchasers. This right to group injunctive relief was given by the General Assembly to prevent car dealerships from perpetrating mass wrongdoing on the public. This is a significant right that cannot be vindicated in the Century BMW arbitration agreement.

Courts in other jurisdictions have found similar provisions unconscionable and unenforceable. *See Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362 (N.C. 2008); *Cooper v. OC Financial Services, Inc.*, 503 F. Supp. 2d 1266, 1290 (D. Ariz. 2007); *Eagle v. Fred Martin Motor Co.*, 809 N.E.2d 1161 (Ohio App. 2004) (concluding provision preventing right to proceed through a class action or as a private attorney general were both against public policy and the underlying purpose of the Consumer Sales Practices Act and thus were unenforceable). *Lozada v. Dale Baker Oldsmobile. Inc.*, 91 F. Supp. 2d 1087 (W.D. Mich. 2000) (arbitration clause in-

volving the sale of automobiles providing for waiver by buyer's or right to proceed by way of a class action was substantially unreasonable and unconscionable); *State Ex Rel. Dunlap v. Berger*, 567 S.E.2d 570, 576 (Fla. Dist. Ct. App. 1998).

The South Carolina Supreme Court has stated that it will not enforce this type of arbitration clause. "[P]reclusion of class-wide or consolidated arbitration in an adhesion contract, even if explicit, undermines principles favoring expeditious and equitable case disposition absent demonstrated prejudice to the drafter of the adhesive contract." *Bazzle v. Green Tree Financial Com.*, 569 S.E.2d 349, 361 (S.C. 2002) (*rev'd on other grounds*). Such clauses are unconscionable because they insulate Defendants from significant exposure brought about when otherwise small claims are grouped together.

The class action and representative capacity suit prohibitions in the Century BMW arbitration agreement are contrary to the "strong public policy reasons" behind the enactment of the Dealers Act and contrary to the Dealers Act's purpose of "punishing acts that adversely affect the public's interest." *Simpson*, 644 S.E.2d at 671. I, therefore, find that the terms of the arbitration agreement are oppressive and violative of public policy and statutory law.

CONCLUSION

Like the arbitration agreement at issue in *Simpson*, there was an absence of meaningful choice by the Wattses in entering into the Century BMW arbitration agreement. Additionally, the Century BMW arbitration agreement's attempt to take away statutory rights under the Motor Vehicle Dealers Act are one-sided and violative of statutory law. I therefore find that the Century BMW arbitration agreement is unconscionable and unenforceable.

Based upon the foregoing, the Motion to Compel Arbitration filed by Century BMW is denied.

AND IT IS SO ORDERED.

No. 10-315

In The

Supreme Court of the United States

SONIC AUTOMOTIVE, 2752 LAURENS RD GREENVILLE, INC. D/B/A CENTURY BMW

Petitioner,

v.

CHRISTINE WATTS, ET AL.

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of South Carolina

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent respectfully submits that the Petition for a Writ of Certiorari to review the judgment of the Supreme Court of South Carolina in this case should be denied.

OPINIONS BELOW

The opinions below are as set forth by Petitioner.

JURISDICTION

This Court does not have jurisdiction pursuant to 28 U.S.C. § 1257(a) and *Southland Corp. v. Keating*, 465 U.S. 1, 6-8 (1984) as contended by Petitioner, because:

1. Petitioner is in default in the court below; and

2. the South Carolina Supreme Court did not decide and was not asked to decide the issue of federal preemption; and

3. the issue of preemption, even if preserved, is inapplicable.

STATUTORY PROVISIONS INVOLVED

In addition to 9 U.S.C. § 2 cited by Petitioner, also involved are the following:

S.C. Code Ann. § 56-15-40. Specific acts deemed unfair methods of competition and unfair or deceptive

acts or practices; Office of Administrator; appointment of personnel; enforcement.

(1) It shall be deemed a violation of paragraph (a) of § 56-15-30 for any manufacturer, factory branch, factory representative, distributor, or wholesaler, distributor branch, distributor representative or motor vehicle dealer to engage in any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or to the public.

S.C. Code Ann. § 56-15-110. Suits for damages.

(1) In addition to temporary or permanent injunctive relief as provided in § 56-15-40(3)(c), any person who shall be injured in his business or property by reason of anything forbidden in this chapter may sue therefor in the court of common please and shall recover double the actual damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

(2) When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief.

(3) In an action for money damages, if the jury finds that the defendant acted maliciously, the jury may award punitive damaged not to exceed three times the actual damages.

(4) A final judgment, order or decree rendered against a person in any civil, criminal or administrative proceeding under the United States

antitrust laws, under the Federal Trade Commission Act, or under this chapter shall constitute prima facie evidence against such person subject to the conditions of the United States Antitrust Law (15 U.S.C. § 16).

S.C. Code Ann. § 56-15-130. Contracts in violation of chapter shall be void.

Any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable.

S.C. Code Ann. § 37-2-307. Notice of closing fees on motor vehicle sales contract; registration fees.

Every motor vehicle dealer charging closing fees on a motor vehicle sales contract shall pay a one-time registration fee of ten dollars during each state fiscal year to the Department of Consumer Affairs. The closing fee must be included in the advertised price of the motor vehicle, disclosed on the sales contract, and displayed in a conspicuous location in the motor vehicle dealership.

STATEMENT

This action was initiated on August 29, 2006. Respondent alleges that Petitioner was charging illegal closing fees in violation of S.C. Code Ann. § 37-2-307 and § 56-15-10, *et. seq.* and did engage in one or more of the following illegal acts:

a. failed to register with the Department of Consumer Affairs;

b. failed to individually register annually with the Department of Consumer Affairs,

c. charged illegal "administrative fees" in excess of the amount for which it registered;

d. failed to disclose the illegal "administrative fees" on sales contracts;

e. charged illegal "administrative fees" in excess of their costs;

f. failed to display the charging of illegal "administrative fees" in a conspicuous location in the dealership;

g. advertised deceptively and illegally by failing to include the "administrative fees" in the advertised price; and

h. created a closing procedure to illegally add "administrative fees."

Respondent contends that the conduct of the Petitioner violates the South Carolina Dealer's Act. (S.C. Code Ann. § 56-15-10).

Petitioner filed a motion to compel arbitration, claiming arbitration was required by an agreement under which the Respondent waived the right to bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration. This motion was denied by the trial court in an order dated March 10, 2008. (Pet 16a). The order properly concluded that *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663 (S.C. 2007) was "the controlling

authority" for the motion. (Pet 18a). Further, as reflected in the order, the motion was decided wholly on state law grounds.

On March 12, 2008, the Petitioner filed a notice of appeal to the South Carolina Court of Appeals. Once again, the issues presented were primarily state issues. As set forth by appellant/petitioner, the statement of issues on appeal to the South Carolina Supreme Court was as follows:

I. Did the trial court err in denying the Appellant's motion to compel arbitration when the court violated the federal and South Carolina policies favoring arbitration?

II. Did the trial court err in denying the Appellant's motion to compel arbitration when the court found the arbitration agreement unenforceable despite the Wattses' undisputed opportunity to read the agreement?

III. Did the trial court err in denying the Appellant's motion to compel arbitration when the court found the underlying arbitration agreement unconscionable?

IV. Did the trial court err in denying the Appellant's motion to compel arbitration when it found Ms. Watts lacked meaningful choice in agreeing to arbitrate?

V. Did the trial court err in denying the Appellant's motion to compel arbitration when the court found the underlying arbitration agreement was a contract of adhesion?

VI. Did the trial court err in denying the Appellant's motion to compel arbitration when the court found the underlying arbitration agreement contained oppressive, one-sided terms that no reasonable person would make or accept?

Petitioner's only possible mention of the Federal Arbitration Act was in passing when Petitioner asserted that the trial court violated federal policy favoring arbitration by resolving doubt against arbitration, Pet. S.C. C.A. Brief. 11. On July 6, 2009, before the South Carolina Court of Appeals ruled, the South Carolina Supreme Court took the appeal. On April 19, 2010, the South Carolina Supreme Court issued its decision wherein it specifically recognized the federal policy in favor of arbitration (Pet 4a). Of significance, the issue of federal preemption of South Carolina law was never raised by the Petitioner. The South Carolina Supreme Court held, wholly on state law grounds,[1] that the provision of the arbitration agreement relied upon by Petitioner was invalid, unenforceable, and in violation of the public policy of South Carolina, specifically South Carolina Code § 56-15-110. The decision in pertinent part is as follows:

> The purpose of the Dealers Act is consumer protection. Damages are typically small in individual consumer cases, thereby discouraging plaintiffs from bringing individual actions. Our Legislature recognized this and

[1] The order denying the Petition for Rehearing confirms that the South Carolina Supreme Court opinion was "wholly based on state law grounds." (Pet 15a).

expressly provided plaintiffs with the right to bring class action lawsuits for violations of the Dealers Act:

> When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief.

Section 56-15-110(2). The Dealers Act further provides: "Any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable." Section 56-15-130.

Stated succinctly, the Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act and that any contract prohibiting a class action suit, violates our State's public policy and is void and unenforceable... We are guided by our state law, and the unmistakable statutory language contained in the Dealers Act indicating our Legislature intended for this to be a non-waivable right. We therefore hold this provision is unenforceable on public policy grounds. *See Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 606 S.E.2d 752, 758 (S.C. 2004) (holding the general rule is that courts will not enforce a contract which is

violative of public policy, statutory law, or provisions of the Constitution).

Following the South Carolina Supreme Court's refusal to enforce the arbitration agreement at issue, Petitioner filed a Petition for Rehearing pursuant to South Carolina Appellate Court Rule 221. Specifically, a petition for rehearing must "state with particularity the points supposed to have been overlooked or misapprehended by the court." Rule 221, SCACR. The Petition for Rehearing did not contend that the South Carolina Supreme Court overlooked the preemption argument now raised by Petitioner [2] Rather, the points raised by Petitioner related to 1) the supposed inconsistency between the opinion and the case of *Stolt-Nielson S.A. v. Animalfeed International Corp.*; 2) whether the South Carolina Legislature intended to created a non-waivable right to bring a class action under the Dealers Act and 3) whether arbitration

[2] The Petitioner argues that *Stolt-Nielson, S A. v Animalfeeds International Corp* , 130 S Ct 1758 (2010) is inconsistent with the South Carolina Supreme Court opinion. Petitioner now argues that the FAA preempts South Carolina law. Petitioner cited three South Carolina cases addressing this proposition These cases held that the FAA did not preempt South Carolina's procedural rule on appealability of arbitration, that the FAA did preempt a notice provision of the South Carolina Arbitration Act and did preempt a state statute precluding arbitration held outside of South Carolina "under the circumstances presented " None of these cases address whether South Carolina public policy involved in the present case is preempted by the FAA. There is not any argument advanced by Petitioner below that the public policy defense does not qualify as a valid ground for revocation of contracts under the exception to 9 U.S C § 2, allowing courts to invalidate arbitration provisions "upon such grounds as exist at law or in equity for the revocation of any contract "

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should be required for causes of action for civil conspiracy and declaratory judgment. At no time did the Petitioner raise the very applicable 9 U S.C. § 2. By order dated June 9, 2010, the South Carolina Supreme Court denied the petition for rehearing stating:

> We deny Century's petition for rehearing. Our opinion affirming the trial court's denial of the motion to compel arbitration is wholly based on state law grounds, namely a provision in a contract banning class action suits is invalid pursuant to the Dealer's Act and the public policy of this State.

On June 9, 2010 the South Carolina Supreme Court issued a remittitur to the trial court which became effective on June 24, 2010. Under South Carolina Rules of Civil Procedure, 12(a), Petitioner's answer was required fifteen days after notice of the South Carolina Supreme Court's action denying rehearing and remitting the case. Petitioner did not answer the complaint by July 9, 2010, Respondents filed an affidavit of default, and the Clerk of Court entered default on August 10, 2010. On September 1, 2010, Petitioner filed a Petition for a Writ of Certiorari to this Court and on September 3, 2010 Petitioner filed in the trial court a motion to set aside the entry of default below. As of the present date Petitioner is still in default.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

Petitioner Century BMW's Petition for Writ of Certiorari to this Court should be denied for three reasons: 1) No justiciable case or controversy exists in this matter as a result of Petitioner being in default; 2) Petitioner has clearly failed to preserve and the South Carolina Supreme Court did not address the federal preemption issue for an appeal to this Court; and, 3) it is the longstanding policy of the United States Supreme Court and Congress to permit courts to void arbitration contracts based on state law.

A. No justiciable case or controversy exists in this matter because Petitioner remains in default.

The Petitioner is in full default in the case below. As set forth above, Petitioner's response to the complaint was due fifteen days after notice of the South Carolina Supreme Court's Opinion affirming the denial of the motion to arbitrate, but petitioner defaulted. This fact was made to appear by affidavit and the Clerk of Court entered default. This is a ministerial act which a clerk of court is required to perform, and the court's entry of default is thus proper. *Stark Trust Co., Inc. v. Superior Constr. Corp.*, 602 S.E.2d 99 (S.C. App. 2004). The Petitioner has now moved to set aside the entry of default but no relief has been granted. Accordingly, at the present time Petitioner is in default and under South Carolina law a defaulting party is deemed to have admitted the truth of plaintiff's allegations and to have conceded liability. Moreover, after default, the trial court may proceed as appropriate to enter judgment. *Roche v.*

Young Bros., Inc., of Florence, 504 S.E.2d 311 (S.C. 1998).

Since Petitioner is in default in this case, no justiciable case or controversy exists which would allow Petitioner the requisite standing to petition this Court for A Writ of Certiorari. For this reason Respondents respectfully submit that the Petition herein should be denied.

B. The South Carolina Supreme Court never addressed the issue of federal preemption nor did the Petitioner properly present it.

The issue upon which Petitioner seeks review here was clearly not addressed by the South Carolina Supreme Court, nor was it raised. Petitioner has not met the burden of showing the preemption issue was properly presented below [3]

In the petition herein Petitioner does not, as required by Rule 14(g)(i), specify the stage in the proceeding the issue was raised in the court of first instance. This being so, the issue is not appropriate for appellate review under South Carolina law which provides that:

> an issue cannot be raised for the first time on appeal, but must have been raised and ruled upon by the trial judge to be preserved for appellate review... Moreover, an objection must

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[3] When the highest state court is silent on a federal question it is presumed that the issue was not properly presented. *Adams v Robertson*, 520 U S. 83, 86 (1977)

be sufficiently specific to inform the trial court of the point being urged by the objector. *Wilder Corp. v. Wilke*, 497 S.E.2d 731 (S.C. 1998).

The Petitioner apparently contends that the preemption issue upon which it now seeks review was raised in its brief to the South Carolina Supreme Court by arguing that the trial court order "violated the federal policy favoring arbitration," (Pet 4) and on petition for rehearing by contending that "*Stolt Nielson* supported the proposition that the FAA preempted any state law that invalidates a provision of an arbitration agreement precluding the availability of class arbitration." (Pet 5).

Petitioners incorrectly argue that they properly raised the pre-emption issue by their contention that the Order on appeal violated federal policy favoring arbitration. This contention, however, in no way raised the issue presented herein. Moreover, the fact that no citation to 9 U.S.C. § 2 and no specific arguments as to the preemption law were made below, as are made in the petition herein, undermines the present assertion that Petitioners presented the issue. The argument, actually made for the first time on petition for rehearing was that, the South Carolina Supreme Court opinion was "inconsistent with" *Stolt-Nielson*. That does not clearly present the preemption argument.

Even so, raising the issue for the first time on Petition for Rehearing renders the issue inappropriate for review under South Carolina law. *Kennedy v. South Carolina Retirement System*, 564 S.E.2d 322 (S.C. 2001) makes clear that an argument not presented on the appeal and therefore not considered

by the court is not proper for consideration when deciding whether to grant a petition for rehearing.

As shown above, Petitioner never presented any preemption issue in the trial court, although the main principles raised by preemption law clearly existed at the time the case was brought. Neither did Petitioner properly raise, with fair precision and in due time, the preemption issue in their brief to the South Carolina Supreme Court or in their Petition for Rehearing. Paraphrasing language set forth in *Adams v. Robertson*, 520 U.S. at 87-88 (1997):

> Petitioners have done nothing to demonstrate that they complied with the applicable state rules for raising their federal [preemption] claim before the [South Carolina] Supreme Court, or to explain why the failure to comply with those rules would not be an adequate and independent ground for the state court to disregard that claim.[4]

In order to reach the merits here, another question which this Court would have to address is whether the determinations of the South Carolina Supreme Court qualifies as a valid ground under 9 U.S.C. §2, allowing courts to invalidate arbitration provisions "upon such grounds as exist at law or in equity for the revocation of any contract." Further, this question regarding the court's right to invalidate arbitration provisions under

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[4] Policy considerations and principles of comity along with practical reasons counsel strongly in favor of requiring a federal challenge be, with fair precision and in a timely manner, presented first to the state court *Webb v. Webb*, 451 U.S. 493, 499-501 (1981).

9 U.S C. §2 is also an issue which was never preserved because it was never presented below and never decided below. Because this question was not presented below and because this question also is not set forth in the questions presented for review, it is respectfully submitted that this issue should not be considered. *Izumi Seimitzu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993) (A questions which is merely "complimentary" or "related" to the question presented in the petition for certiorari is not "fairly included therein."); *Andrew v. Louisville & N. R. Co.*, 406 U.S. 320 (1972).

For this reason it is respectfully submitted that the petition herein should be denied.

C. It is the longstanding policy of the United States Supreme Court and Congress to allow courts to void arbitration contracts based on state law defenses, which includes agreements in violation of public policy.

Contrary to the Petitioner's argument, the decision of the South Carolina Supreme Court did not hold that "notwithstanding the Federal Arbitration Act" state law could invalidate a provision of an arbitration agreement precluding the availability of class arbitration. Rather, the opinion of the South Carolina Supreme Court narrowly addressed only a single provision of a specific contract which violates Chapter 15 of Title 56 of the South Carolina Code (Dealers Act).

As the opinion makes clear, the provision of the contract at issue violates the clearly enunciated legislatively enacted public policy of South Carolina.

This does not mean, and the court opinion below held, that anti-class action arbitration agreement clauses, across the board, are prohibited, or can be prohibited under state law The opinion, in fact, is in accord with the accepted proposition under 9 U.S.C. § 2 which states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Courts are allowed to consider contract defenses which are generally applicable to all state law contracts, such as the contract being violative of public policy. *Doctor's Assocs. Inc. v. Casarotto*, 517 U.S. 681, 686–687 (1996). Under South Carolina law it is clearly long- established that individuals may never enter contracts in violation of the expressed public policy of the State, *Dill v. Sovereign Camp*, 25 S.E.2d 285 (S.C. 1943), and that contracts in contravention of "public policy" as is found in statute, as here, and the constitution and judicial decisions of this state are void, *White v. J. M. Brown Amusement Co.*, 601 S.E.2d 342 (S.C. 2004). There is no debate that the "violation of public policy defense" is generally applicable to all contracts in South Carolina. In fact, the decision below

enunciates this principle very clearly and is now the law of the case as to this issue. (Pet 10a).

It is also noteworthy that the action here is truly one of state law and not a true class action with the normal requirements of Rule 23. The case is brought under a specific state statute, limited to Dealers Act cases, with the requirements for bringing the action for the benefit of the whole being that the action is one of common or general interest to many persons, or when the parties are numerous and it is impractical to bring them all before the court. Thus, the anti-class action provision of the arbitration agreement[5] is not implicated in true class actions and those brought on non Dealer Act causes of action. The enforceability is only implicated in case of a contract which violates the legislatively declared public policy as set forth in the Dealers Act. Contrary to Petitioner's contention, the state law rule invalidating contracts against public policy is not aimed specifically at dispute resolution agreements but instead covers all contracts which are against public policy of South Carolina as enunciated in its statutes, constitution and judicial decisions.

The South Carolina Supreme Court Opinion determined that the provision of the arbitration agreement violates South Carolina legislatively

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[5] This provision also prohibits "claimant action in court or through arbitration," and if enforced would not allow vindication of any claim at all. This is unlike the *AT&T Mobility* case where the question presented was whether the FAA preempts conditioning enforcement of an arbitration agreement when those procedures are not necessary to insure that the parties are able to vindicate their claims. *AT&T Mobility, LLC v. Concepcion*, No 09893 *(cert. granted* May 24, 2010).

enacted public policy. The opinion also held that courts in South Carolina will not enforce contract provisions in violation of public policy. (Pet 9a-10a). Both of these determinations are based solely on state law. Both of these determinations are now binding upon all parties both as the law of the case and as precedent. *Ulner v. Ulner*, 369 S.C. 486, 632 S.E.2d 858 (2006); *Robert E. Lee & Co. v. Comm'n of Pub. Works of City of Greenville*, 158 S.E.2d 185 (S.C. 1967). Moreover, these are wholly state law determinations which are not proper for consideration here.

For these reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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October 1, 2010

No. 10-315

In the Supreme Court of the United States

SONIC AUTOMOTIVE, 2752 LAURENS RD., GREENVILLE, INC., D/B/A CENTURY BMW, PETITIONER

v

CHRISTINE WATTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

No. 10-315

SONIC AUTOMOTIVE, 2752 LAURENS RD., GREENVILLE, INC., D/B/A CENTURY BMW, PETITIONER

v.

CHRISTINE WATTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

REPLY BRIEF FOR THE PETITIONER

Respondents do not seriously dispute that the question presented in this case is materially identical to that presented in *AT&T Mobility LLC* v. *Concepcion*, No. 09-893 (to be argued Nov. 9, 2010): *viz.*, whether the Federal Arbitration Act (FAA) preempts a state law invalidating a prohibition on class arbitration contained in an arbitration agreement. Respondents instead offer two reasons why that question is not properly presented here. Those reasons are entirely illusory, and the decision in *AT&T Mobility* will have a direct and potentially outcome-determinative effect on the resolution of this case. The petition for certiorari should therefore be held pending the Court's disposition of *AT&T Mobility*, and then disposed of accordingly.

(1)

1. As explained at greater length in the petition, this case presents a materially identical question to the question presented in *AT&T Mobility*, because the South Carolina Supreme Court held that state law could invalidate a provision of an arbitration agreement precluding the availability of class arbitration. See Pet. 6-8. That state-law rule, like the one at issue in *AT&T Mobility*, is preempted by the strong federal policy, embodied in the FAA, of "ensur[ing] that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen, S.A.* v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010) (internal quotation marks and citation omitted).

Respondents attempt to distinguish this case from *AT&T Mobility* only in a single footnote, in which they argue that the relevant provision of the arbitration agreement here differs from the relevant provision in *AT&T Mobility*. See Br. in Opp. 16 n.5. That contention, however, rests on a blatant misquotation of the arbitration agreement. Far from "prohibit[ing] 'claimant action in court or through arbitration,'" *ibid.*, the relevant provision of the arbitration agreement merely prohibits parties from "bring[ing] or participat[ing] in any class action or *multi*-plaintiff or claimant action in court or through arbitration." S.C. C.A. App. 1100 (emphasis added). It is therefore simply wrong to say, as respondents do, that the provision "would not allow vindication of any claim at all," Br. in Opp. 16 n.5; the provision prohibits only *class* (or other multi-claimant) litigation. And in that respect, the provision is indistinguishable from the provision at issue in *AT&T Mobility*, which provides that "class arbitrations and class actions are not permitted." Pet. App. at 57a, *AT&T Mobility*, *supra*. Because there is no legal or factual basis for distinguishing this

case from *AT&T Mobility*, a hold for *AT&T Mobility* is warranted.[1]

2. Respondents contend (Br. in Opp. 10-14) that the preemption question is not properly presented in this case for two reasons: first, because the preemption argument was not adequately preserved below, and second, because petitioner is in default in proceedings on remand. Both of those reasons are invalid.

a. As noted in the petition, petitioner consistently argued before the lower courts that it would violate the strong federal policy in favor of arbitration to invalidate the prohibition on class arbitration under state law: in other words, that any state-law basis for invalidating that prohibition would be preempted. See Pet. 4. Even before the trial court, petitioner contended that "[t]he FAA embodies the strong federal policy in favor of enforcing arbitration agreements," Mem. in Support of Mot. to Compel Arb. 4 (internal quotation marks and citation omitted), and that "South Carolina courts give due regard . . . to the federal policy favoring arbitration," Reply Mem. in Support of Mot. to Compel Arb. 1 n.1 (internal quotation marks and citation omitted). And in its brief before the South Carolina Supreme Court, petitioner unambiguously contended that the trial court's

[1] Respondents seemingly contend (Br. in Opp. 16) that, to the extent that they are pursuing claims under the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act, S.C. Code Ann. §§ 56-15-10 to 56-15-140 (2009), this case does not involve a "true" class action. That is a bewildering contention, because the Dealers Act "expressly provide[s] plaintiffs with the right to bring class action lawsuits"—as the South Carolina Supreme Court noted in holding that "any contract prohibiting a class action suit [for violations of the Dealers Act] violates our State's public policy and is void and unenforceable." Pet. App. 9a, 10a.

holding that the prohibition on class arbitration was unconscionable under state law "violated the federal policy favoring arbitration." Pet. S.C. C.A. Br. 11; see *id.* at 1 (contending, in first question presented, that the trial court "violated the federal and South Carolina policies favoring arbitration").

Respondents do not dispute, moreover, that petitioner raised the preemption argument as its primary argument in its petition for rehearing in the South Carolina Supreme Court. See Pet. for Reh'g 3-7; cf. *id.* at 3 (contending that "[t]he FAA clearly preempts South Carolina law, as this Court construed it"); Return to Pet. for Reh'g 1-2 (responding to preemption argument); Reply in Support of Pet. for Reh'g 3 (renewing contention that "[t]he FAA, as *Stolt-Nielsen* construed it, preempts any South Carolina public policy requiring class arbitration under the Dealers Act").[2] Instead, respondents merely contend (Br. in Opp. 8-9, 12-13) that petitioner's preemption argument was an improper basis for rehearing.

As a preliminary matter, even if petitioner had not raised its preemption argument at earlier stages of the litigation, but see pp. 3-4, *supra*, petitioner would have been thoroughly justified in doing so for the first time in its petition for rehearing. That is true both because the South Carolina Supreme Court had invalidated the prohibition on class arbitration on a novel state-law ground that was neither adopted by the trial court nor advanced

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[2] Respondents contend (Br. in Opp. 9, 12, 13-14) that petitioner somehow forfeited its preemption argument because petitioner did not cite 9 U.S.C. 2 in its petition for rehearing. It was hardly necessary for petitioner to do so, however, in light of its unambiguous assertions that the FAA preempts state law—not least because 9 U.S.C. 2 is only one of numerous provisions in the FAA embodying the federal policy in favor of arbitration. See Pet. 7.

by respondents, see Pet. 4-5, and because petitioner was primarily relying on *Stolt-Nielsen*, a decision of this Court that postdated the South Carolina Supreme Court's decision, see Pet. 5. But in any event, the South Carolina Supreme Court plainly thought that the preemption argument had been properly preserved, because, in denying the petition for rehearing, it rejected that argument on the merits—albeit in dismissive fashion. See Pet. App. 15a (stating that *Stolt-Nielsen* was "distinguishable on the law and the facts"). Because petitioner's preemption argument was both raised and passed upon below, there is no basis for concluding that the argument has been forfeited.

b. Equally meritless is respondents' contention (Br. in Opp. 11) that there is "no justiciable case or controversy" because petitioner is in default in proceedings on remand. As respondents acknowledge, proceedings are ongoing before the trial court, see *id.* at 10—and that is sufficient to ensure that the question presented to this Court is not moot for Article III purposes.

We add only that respondents' account of proceedings below is seriously misleading. As respondents omit to mention, when petitioner appealed the trial court's initial ruling on its motion to compel arbitration, the parties agreed to stay further proceedings in the trial court for the "duration of [the] appeal." Mot. to Stay 1. Out of an abundance of caution, after the South Carolina Supreme Court denied petitioner's petition for rehearing, petitioner filed a motion to continue the stay pending the filing of its petition for certiorari in this Court. See Mot. to Continue in Place the Stay. Although the stay remains in effect (and petitioner's motion remains pending), respondents unexpectedly took the position that petitioner was obligated to file an answer to the complaint—and, on that basis, filed a request for entry of default.

Under South Carolina law, the entry of default is a "ministerial act which a clerk is required to perform once default is made to appear by the affidavit of the moving party," and the validity of the default is subsequently litigated by means of a motion to set aside the default. *Stark Truss Co.* v. *Superior Constr. Corp.*, 602 S.E.2d 99, 102 (S.C. Ct. App. 2004). Critically, "while a clerk may make an *entry* of default, a judge is required to enter a default *judgment*." *Wetzel* v. *Woodside Dev. Ltd. P'ship*, 615 S.E.2d 437, 439 n.2 (S.C. 2005). Consistent with that practice, the clerk of the trial court entered a default and petitioner subsequently filed a motion to set aside the default, which is pending. Under the circumstances, it is exceedingly unlikely that the trial court will deny the motion and enter judgment in respondents' favor.

In any event, the salient fact is that no final judgment has yet been entered. Because there is therefore a live issue whether the underlying dispute between the parties should be resolved in court or in arbitration, this Court has jurisdiction to consider the question presented. And because that question is materially identical to the question presented in *AT&T Mobility*, a hold for *AT&T Mobility* is warranted.

* * * * *

The petition for a writ of certiorari should be held pending this Court's disposition of *AT&T Mobility LLC* v. *Concepcion*, No. 09-893, and then disposed of accordingly.

Respectfully submitted.

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OCTOBER 2010

No. 10-315

In the Supreme Court of the United States

SONIC AUTOMOTIVE, 2752 LAURENS RD., GREENVILLE, INC., D/B/A CENTURY BMW, PETITIONER

v.

CHRISTINE WATTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

SUPPLEMENTAL BRIEF FOR THE PETITIONER

On April 27, 2011, this Court issued its decision in *AT&T Mobility LLC* v. *Concepcion*, No. 09-893, holding that the Federal Arbitration Act (FAA) preempts any state-law rule that "stand[s] as an obstacle to the accomplishment of the FAA's objectives." Slip op. 9. The state-law rule that the Court held to be preempted in *AT&T Mobility* is materially indistinguishable from the state-law rule at issue in this case. Like the rule in *AT&T Mobility*, the rule at issue here invalidates a prohibition on class arbitration contained in an arbitration agreement on the ground that it is "unconscionable or unenforceable as against public policy." *Id.* at 7. And like the rule in *AT&T Mobility*, the rule at issue here, although it "does not *require* classwide arbitration," *id.* at 12, contravenes the "overarching purpose" of the

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FAA: *viz.*, "to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Id.* at 9. In so doing, the rule "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Ibid.*

Because the lower court's rejection of petitioner's preemption argument cannot be reconciled with this Court's reasoning in *AT&T Mobility*, the Court should grant the petition for certiorari, vacate the judgment below, and remand the case for further consideration in light of *AT&T Mobility*.

Respectfully submitted.

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IN THE

Supreme Court of the United States

SONIC AUTOMOTIVE, 2752 LAURENS RD., GREENVILLE, INC., D/B/A CENTURY BMW,
Petitioner,

v.

CHRISTINE WATTS, ET AL.
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

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IN THE

Supreme Court of the United States

No. 10-315

SONIC AUTOMOTIVE, 2752 LAURENS RD., GREENVILLE, INC., D/B/A CENTURY BMW,
Petitioner,

v.

CHRISTINE WATTS, ET AL.
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

Petitioner, in its Supplemental Brief, argues that the decision in *AT&T Mobility, LLC v. Concepcion*, No. 09-893, is indistinguishable from this case, and that the lower court's rejection of Petitioner's pre-emption argument cannot be reconciled with *AT&T* case. The issue in AT&T was whether the Federal Arbitration Act (FAA) preempted "California's ***rule*** classifying most collective-arbitration waivers in consumer contracts as unconscionable." *AT&T*, p. 5 (emphasis added). The California rule was a judicially created rule set forth in *Discover Bank v. Superior Court*, 36 Cal 4th 148, 113 P.3d 1100 (2005).

In *AT&T*, the majority did not go so far as to preempt a State's statutorily-mandated, substantive right, which is the issue in this case. The South Carolina Dealers Act, S.C. Code Anno. § 56-15-110 provides that "one or more [persons] may sue for the benefit of the whole, including actions for injunctive relief." The South Carolina Supreme Court held that the Legislature had specifically recognized the need for consumer protection with regard to automobile dealers:

> The purpose of the Dealers Act is consumer protection....Our Legislature recognized this and expressly provided plaintiffs with the right to bring class action lawsuits for violations of the Dealers Act.

Herron v. Century BMW, 387 S.C. 525, 536, 693 S.E.2d 394, 400 (2010), reh'g denied (June 9, 2010). The Court continued:

> Stated succinctly, the Legislature has made clear that the public policy of this State is to provide consumers with a **non-waivable right** to bring class action suits for violations of the Dealers Act and that any contract prohibiting a class action suit violates our State's public policy and is void and unenforceable.

Herron v. Century BMW, 387 S.C. 525, 536, 693 S.E.2d 394, 400 (emphasis added). The *AT&T* case only involved a judicial rule stating that generally, class action waivers were unconscionable. This case involves a substantive right allowing a person to "sue for the benefit of the whole" as expressly provided by a South Carolina statute. Is it the Supreme Court's opinion that the FAA can preempt a consumer's

substantive right conferred by a South Carolina state statute?

A state's statutory laws become part of, and are incorporated in, every contract. See, e.g., *Barnitz v. Beverly*, 163 U.S. 118, 127, 16 S. Ct. 1042, 1045, 41 L. Ed. 93 (1896) (stating that all the laws of a state existing at the time a mortgage or any other contract is made, which affect the rights of the parties to the contract, enter into and become a part of it). Here, there are perceived conflicting provisions: a right under the Dealers' Act, S.C. Code Anno. § 56-15-110, which provides that "one or more [persons] may sue for the benefit of the whole, including actions for injunctive relief" and a prohibition against class actions in the arbitration agreement. The South Carolina Supreme Court specifically found that the right to a group or class action was "a non-waivable right" under the Dealers Act. *Herron v. Century BMW,* 387 S.C. 525, 536, 693 S.E.2d 394, 400. The *AT&T* decision cannot be said to have eradicated the protection of a statutory, non-waivable right that is not limited solely to arbitration, but applies to any proceeding involving the Dealers Act.

Also, as Justice Thomas noted in a separate opinion in the *AT&T* case, if there is a defect in the formation of the arbitration agreement, the agreement is not enforceable. The conflict between the South Carolina statute and the arbitration provision creates a defect in the formation of the agreement because the agreement attempts to force a waiver of a non-waivable right.

Furthermore, there is no justiciable case or controversy in this matter because the Petitioner is in full default in the case below. An entry of default has been entered, and while Petitioner has moved to set

aside the entry of default, no relief has been granted. As the defaulting party, Petitioner has admitted all allegations of the complaint and conceded liability, and there is no justiciable case or controversy to provide Petitioner standing to petition for A Writ of Certiorari.

Therefore, Respondents submit that the Petition for A Writ of Certiorari should be denied.

Respectfully submitted,

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April 29, 2011

No.

In the Supreme Court of the United States

SONIC AUTOMOTIVE, 2752 LAURENS RD., GREENVILLE, INC., D/B/A CENTURY BMW, PETITIONER

v

CHRISTINE WATTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011), the Federal Arbitration Act preempts a state-law rule that invalidates a provision of an arbitration agreement precluding the availability of class arbitration.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Sonic Automotive, 2752 Laurens Rd., Greenville, Inc., doing business as Century BMW. Petitioner is wholly owned by Sonic Automotive, Inc., a publicly held company. Sonic Automotive, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondents are Christine Watts, Natalie Armstrong, Michael Blease, Alison Dannert, Julie Freeman, Heather Herron, Michael Ritz, and Michael Watts.

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In the Supreme Court of the United States

No.

SONIC AUTOMOTIVE, 2752 LAURENS RD., GREENVILLE, INC., D/B/A CENTURY BMW, PETITIONER

v.

CHRISTINE WATTS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI

Sonic Automotive, 2752 Laurens Rd., Greenville, Inc., doing business as Century BMW, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of South Carolina in this case.

OPINIONS BELOW

The order of the South Carolina Supreme Court reinstating its original opinion (App., *infra*, 1a-11a) is reported at 719 S.E.2d 640. The original opinion of the South Carolina Supreme Court (App., *infra*, 12a-23a) is reported at 693 S.E.2d 394. The South Carolina Supreme Court's order denying rehearing (App., *infra*, 24a-26a) and the trial court's order denying petitioner's motion to compel arbitration (App., *infra*, 27a-40a) are unreported.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on December 19, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a). See *Southland Corp.* v. *Keating*, 465 U.S. 1, 6-8 (1984).

STATUTORY PROVISION INVOLVED

Section 2 of the Federal Arbitration Act, 9 U.S.C. 2, provides in relevant part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

Respondents filed a class action in South Carolina state court against petitioner and others. Pursuant to the terms of an arbitration agreement governed by the Federal Arbitration Act (FAA), petitioner moved to compel arbitration of respondent Christine Watts's claim. The trial court denied the motion. App., *infra*, 27a-40a. The South Carolina Supreme Court affirmed, holding *sua sponte* that a provision of the arbitration agreement precluding the availability of class arbitration was invalid under the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (the Dealers Act). *Id.* at 12a-23a. Petitioner filed a petition for rehearing, contending that the FAA preempted the Dealers Act to the extent it invalidated such a provision.

After rejecting petitioner's preemption argument on the merits, the South Carolina Supreme Court denied the petition. *Id.* at 24a-26a.

Petitioner then filed a petition for certiorari in this Court, contending that this case presented a materially identical question to the one then pending in *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011). After issuing its decision in *AT&T Mobility*, the Court granted the petition, vacated the judgment below, and remanded. See 131 S. Ct. 2872 (2011). On remand, however, the South Carolina Supreme Court refused to reconsider its original opinion, determining that petitioner had failed adequately to preserve its preemption argument—even though petitioner had raised that argument in its earlier petition for rehearing and the court had then considered it on the merits. App., *infra*, 1a-11a.

1. Petitioner is an automobile dealer in Greenville, South Carolina. In 2005, respondent Michael Watts purchased a 2004 BMW Z4 convertible from petitioner as a graduation present for his daughter, respondent Christine Watts. In the course of doing so, Mr. Watts and Ms. Watts executed an arbitration agreement. Under the terms of that agreement, which was expressly governed by the FAA, any dispute between the parties would be subject to arbitration. Of critical relevance here, the arbitration agreement provided that the parties "waiv[ed] their right to * * * bring or participate in any class action or multi-plaintiff or claimant action in court or through arbitration." App., *infra*, 20a; S.C. C.A. App. 94, 136, 1106; Pet. S.C. C.A. Br. 1-7.

2. On October 31, 2006, respondents filed a class action in South Carolina state court against petitioner and more than 300 other automobile dealers. S.C. C.A. App. 68-147. They contended, *inter alia*, that the dealers had improperly charged "administrative fees" in connection

with the sale of vehicles, in violation of the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act, S.C. Code Ann. §§ 56-15-10 to 56-15-140 (2006).[1]

Pursuant to the terms of the arbitration agreement, petitioner moved to compel arbitration of Ms. Watts's claim; Ms. Watts opposed the motion on the ground that the arbitration agreement was unconscionable under South Carolina law. The trial court denied the motion. App., *infra*, 27a-40a. The court agreed with Ms. Watts that the arbitration agreement was "unconscionable and unenforceable" on the grounds that Ms. Watts "had an absence of meaningful choice when she entered into the arbitration agreement," *id.* at 29a, and that "[t]he Century BMW arbitration agreement contains oppressive and one-sided terms," *id.* at 35a.

3. Petitioner appealed to the South Carolina Court of Appeals. The South Carolina Supreme Court *sua sponte* certified the appeal for its own review and then affirmed in result. App., *infra*, 12a-33a.

The South Carolina Supreme Court first agreed with petitioner that the trial court had erred in holding that the arbitration agreement as a whole was unconscionable. App., *infra*, 16a-19a. The court determined that Ms. Watts "had a meaningful choice in signing the [arbitration agreement]," *id.* at 17a, and that "the[] terms [of the agreement] are neither oppressive nor one-sided," *id.* at 19a.

The South Carolina Supreme Court nevertheless held that the provision of the arbitration agreement precluding the availability of class arbitration was

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[1] Because the other respondents besides Ms. Watts all purchased vehicles from dealers other than petitioner, they were nominal parties below and remain so here. See S C C.A. App. 135-136.

invalid. App., *infra*, 20a-21a. Critically for present purposes, it did so on a discrete ground that was neither advanced by Ms. Watts nor adopted by the trial court: *viz.*, that, wholly apart from whether the arbitration agreement as a whole was unconscionable under South Carolina law, the agreement's waiver of class arbitration was inconsistent with a provision of the Dealers Act allowing claims under that act to be brought as class actions. *Ibid.* (citing S.C. Code Ann. § 56-15-110(2) (2006)).[2] Although the provision at issue merely authorized class actions and did not state that the right to file a class action was non-waivable, the court determined that "the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act"—and, for that reason, it concluded that "any contract prohibiting a class action suit violates our State's public policy and is void and unenforceable." *Id.* at 21a.

4. In response to the South Carolina Supreme Court's unexpected reliance on the Dealers Act, petitioner filed a petition for rehearing, in which it primarily argued that "[t]he FAA clearly preempts South Carolina law, as this Court construed it." S.C. S. Ct. Pet. for Reh'g 3. In so arguing, petitioner heavily relied on *Stolt-Nielsen, S.A.* v. *AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010). In that case—decided shortly after the South Carolina Supreme Court issued its decision—this Court held that it violated the FAA to impose class arbitration on a party that had agreed only to bilateral arbitration. *Id.* at 1775.

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[2] Indeed, the court explicitly acknowledged that the argument was one that Ms. Watts had not made. *See* App., *infra*, 20a.